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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 482.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

against

STANDARD OIL COMPANY,
Appellee.

BRIEF ON BEHALF OF APPELLEE, STANDARD OIL COMPANY.

Appeal from The United States Commerce Court.

CHESTER O. SWAIN,
Solicitor for Appellee,
Standard Oil Company (of New Jersey).

JOHN G. MILBURN,
M. F. ELLIOTT,
CHESTER O. SWAIN,
Of Counsel.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

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No. 482.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,
Appellants,

AGAINST

STANDARD OIL COMPANY,
Appellee.

BRIEF FOR APPELLEE.

Statement of Case.

The Appellee controverts such parts of the Statements of the Case contained in the briefs for the appellants as purport to set forth the "questions involved," and says that the question involved in this suit is substantially as follows:

Whether the owners of private pipe lines, who have used such lines solely as facilities for carrying on their own business, who have never carried any oil but their own, have never held themselves out as common carriers, are not organized under and derive no powers from State laws under which common carrier corporations are organized, and have never

exercised or attempted to exercise and do not possess any right of eminent domain, were, by the provisions of the Interstate Commerce Act, as amended June 29th, 1906, subjected to that Act and charged with the duties and obligations of common carriers, and whether, if so, the Act, as to such owners of private pipe lines, be not void as in violation of the Fifth Amendment of the Constitution of the United States.

The Court below, construing the Act as embracing within its terms the owners of such private pipe lines, held that, as to them, the Act was in violation of the said Fifth Amendment and, therefore, void.

Statement of Facts.

All the essential facts were found in favor of Appellee by the Court below (Record in case 481, opinion, pp. 97–9, 134–5).

The Appellee, Standard Oil Company, is a private business corporation, organized and existing under the laws of the State of New Jersey, with its principal office at Bayonne, in said State (Record, pp. 1, 61, 87). It was incorporated August 5, 1882, under the New Jersey Corporation Act of 1875, and its principal business is and always has been the manufacture and sale of the products of crude petroleum (Record, p. 1).

Substantially ever since its incorporation said Company has been and is now actually a large manufacturer of the products of crude petroleum (Record, pp. 1, 17). It owns and operates large oil refineries at Bayonne, Bayway and Jersey City, in the State of New Jersey, and at Baltimore, in the State of Maryland (Record, pp. 1, 17, 61). For the purpose of supplying its said refineries with crude oil, it owns and operates, as plant facilities, certain pipe lines, as follows:

(1) From Unionville, New York, near the line between the States of New York and New Jersey, to the Bayonne refinery.

(2) From Centerbridge, Pennsylvania, on the Delaware River, to the Bayway and Bayonne refineries.

(3) From Fawn Grove, Pennsylvania, on or near the line between the States of Pennsylvania and Maryland, to the Baltimore refinery.

The Company also has a short line connecting its Bayonne refinery with its Eagle Works, at Communipaw, Jersey City (Record, pp. 1, 2, 61, 79).

All these pipe lines are employed constantly and substantially to their full capacity in transporting the crude oil required for the Company's own business (Record, pp. 2, 79, 80).

The theoretical capacity of said pipe lines is about 82,000 barrels per day, whereas the normal daily capacity of Appellee's four refineries, above named, is about 84,000 barrels of crude oil, and an additional daily quantity of 4,500 barrels is required for Appellee's export business (Record, pp. 79, 80, 81).

The original corporation bearing the name of Standard Oil Company was the Standard Oil Company of Ohio, which was incorporated in the year 1870 under the laws of that State, and was and always has been a private business corporation engaged in the manufacture and sale of refined oil and other products of petroleum. It has not now and never had any right of eminent domain or any public franchise of any sort, except the right to be a corporation. Between 1870 and 1882, the various properties acquired or built by the persons interested in that company, or the stocks representing said properties, were all held by or for the benefit of the Standard Oil Company of Ohio and its stockholders. In this manner there was acquired for that company in 1877 a small refinery at Bayonne, New Jersey, and also, in the same year, a number of small refineries at Baltimore, which were united and held by the Baltimore United Oil Company, a

Maryland corporation. These refineries at Bayonne and Baltimore were much enlarged before 1882. In like manner, the Standard Oil Company of Ohio, prior to 1882, began the construction at Jersey City of another large refinery, which subsequently became the so-called "Eagle Works." After the incorporation of Appellee, in 1882, all of said refineries at Bayonne, Baltimore and Jersey City were conveyed to it, and it has ever since held, owned and operated them; and since their conveyance to Appellee each of said refineries has been further greatly enlarged (Record, p. 2).

Beginning about the year 1874, various small pipe lines in the State of Pennsylvania were acquired for the Standard Oil Company of Ohio and its stockholders, and these lines were extended as rapidly as possible by that company to supply crude oil to its various refineries. For the purpose of supplying its refineries already referred to at Bayonne and Jersey City, a pipe line was projected from the Pennsylvania field and was built across southern New York to the New Jersey line, and, in the latter part of 1880 and the early part of 1881, private rights of way were purchased by the Standard Oil Company of Ohio from Unionville, New York, which is on or near the line between the States of New York and New Jersey, to Bayonne, New Jersey, title to the same being taken in the names of individuals, except as to a few pieces which were conveyed directly to the Standard Oil Company of Ohio. The building of the line from Unionville across the State of New Jersey followed closely upon the acquisition of the said right of way, and, in the latter part of 1881, the said right of way was transferred by the original grantees to the National Transit Company, a company with a special charter granted by the State of Pennsylvania, which had been patented April 30, 1881, to take over such of the pipe lines belonging to or held for the Standard Oil Company of Ohio or its stockholders as might be transferred to it. Under the terms of its charter, the National Transit Company

was then and has always been a common carrier within the State of Pennsylvania. The pipe line from Unionville across the State of New Jersey to Bayonne was put into operation in 1882 by the National Transit Company and was thereafter operated by that company until May 1, 1894 (Record, pp. 2, 3).

On or about May 1, 1894, this pipe line was transferred by the National Transit Company to the New York Transit Company, a corporation organized under the laws of the State of New York, which at the same time acquired the pipe lines then existing in the State of New York belonging to the National Transit Company. Thereafter the pipe line from Unionville to Bayonne was operated by the New York Transit Company until it was sold by that company to Appellee (Record, p. 3).

The New York Transit Company was incorporated under the Transportation Corporations Law of the State of New York, by virtue of which and of the franchise thereby conferred it became a common carrier within the State of New York (Record, p. 3).

Prior to 1896, the National Transit Company owned a pipe line extending from Millway, in southeastern Pennsylvania, to Centerbridge, on the Delaware River. Prior to that date, Appellee's refineries at Bayonne and Jersey City had been greatly enlarged and their requirements of crude oil had correspondingly increased. For the purpose of meeting these requirements by bringing these refineries into direct connection with the more southerly oil fields, a private right of way for a pipe line from Centerbridge, Pennsylvania, to Bayonne, New Jersey, was, at the instance of Appellee, purchased by the National Transit Company in 1896 and 1897, the title being first taken in the name of an individual, with the exception of a few pieces, the grants of which ran to the National Transit Company or to Appellee. In 1897 this right of way was transferred by the original grantee to the National

Transit Company, which, in that year, at the instance of Appellee, built a pipe line upon it from Centerbridge to Bayonne, and operated the same until its sale to Appellee (Record, pp. 3, 4).

Prior to the year 1883 the National Transit Company owned a pipe line running from Millway, Pennsylvania, south to Fawn Grove, on or near the Pennsylvania-Maryland state line. For the purpose of supplying the Baltimore refinery of Appellee, a private right of way from Fawn Grove to Baltimore was, at the instance of Appellee, purchased by the National Transit Company, title being taken in the name of an individual, with the exception of a single grant which ran to the National Transit Company. In February, 1885, this right of way was conveyed by the original grantee to the National Transit Company, which, meanwhile, had at the instance of Appellee built a pipe line on said right of way from Fawn Grove to Baltimore, and continued to operate the same until its sale to Appellee (Record, p. 4).

Neither the National Transit Company nor the New York Transit Company was ever reincorporated in the State of New Jersey. There has never been any public pipe line statute in New Jersey, and a common carrier pipe line corporation is wholly unknown to the law of that State. The National Transit Company was never reincorporated in the State of Maryland and there has never been a public pipe line statute in that State. The rights of way for said pipe lines, throughout their entire extent, both in New Jersey and in Maryland, were purchased at private sale or acquired by private contract, and no one of the grants of the rights of way contains any provision which directly or indirectly obligates the grantee to operate the pipe line constructed, or to be constructed, thereon for public use (Record, p. 4). Neither the National Transit Company nor the New York Transit Company ever exercised any right of eminent domain or acted as a common carrier in the State of New Jersey, and

the National Transit Company never exercised any right of eminent domain or acted as a common carrier in the State of Maryland (Record, pp. 87, 88).

Of the Unionville line, about thirty-four miles, and of the Centerbridge line, about seventeen miles, are located on railroad rights of way (Record, p. 35). Under the General Railroad Law of New Jersey, the railroads in that State own their rights of way in fee simple.

Currie v. N. Y. Transit Co., 66 N. J. Eq., 313.

On or about November 3, 1905, the boards of directors of the National Transit Company and New York Transit Company, respectively, passed resolutions authorizing the sale to Appellee of their pipe line properties in New Jersey and Maryland, and thereafter and on or about July 17, 1906, deeds conveying said properties were duly executed and delivered to Appellee, with the exception of the deeds for certain small pieces of land which were overlooked at the time of the original transfer and were executed and delivered to Appellee in 1908, on the discovery of the oversight; and the operation of said properties was taken over by Appellee in August, 1906. At Unionville, which then became the eastern terminus of the pipe lines of the New York Transit Company, that company built large tanks as a delivery station, and Appellee acquired a piece of land in New York along the State line and built thereon a pumping station and suction and discharge lines. Since that time, oil arriving at Unionville through the lines of the New York Transit Company is received by said Transit Company into its said delivery tanks. When any particular tank is full, the pumping is, as to it, discontinued, and, in the case of oil consigned to Appellee, the New York Transit Company notifies said Appellee that it has oil ready for delivery. The tank is then gauged by representatives of the two companies, after which Appellee's pumping station proceeds to draw the oil out of

the tank by means of the suction lines above mentioned, carry it through the pumping station and pump it on toward its refineries through the discharge lines. That method of operation has been carried on continuously to the present time (Record, pp. 4, 5, 91).

In like manner, and at or about the same time, the National Transit Company established delivery stations at its termini at Centerbridge and Fawn Grove, and Appellee built pumping stations at those places to take the oil away from said delivery stations for its own uses and purposes (Record, p. 5).

The pipe lines owned and operated by Appellee cross the State line into New York at Unionville, and the State line into Pennsylvania at Centerbridge and Fawn Grove for the short distance necessary to reach the tanks of the Transit companies, and thus take away oil consigned to Appellee (Record, p. 92).

On the other hand, prior to the building of Appellee's said pumping stations and of the Transit Companies' said delivery tanks, in 1906, the pipe lines had been continuous and unbroken, and oil had been pumped through them across the state lines and on toward the seaboard (Record, p. 92).

This description of the course of dealing at Unionville, Centerbridge and Fawn Grove is in exact accord with the agreed statement signed by counsel for the United States (Record, pp. 91–2), and the assertion in the brief for the United States (page 11), that "the oil flows with practical continuity and the transportation now is substantially as it was before New York Transit Company and National Transit Company conveyed portions of their lines * * * to the appellee Standard Oil Company" are therefore wholly without justification in fact.

For many years prior to 1906, and, so far as known, from the opening of the pipe line from Unionville, in 1882, all the oil which came through the New Jersey and Maryland lines

above described was the property of the Standard Oil Company of New York, a corporation organized and existing under the laws of that State, which was the sole owner and sole shipper of such oil. So far as known, neither the National Transit Company nor the New York Transit Company ever held itself out to carry oil through those lines for the public (Record, p. 5).

Since August, 1906, the said pipe lines through New Jersey and Maryland have been owned and operated solely and exclusively by Appellee, and all the oil which has been piped or transported through them by Appellee has been owned by Appellee and used by it in the conduct of its private business, and Appellee has not piped or transported, or permitted to be piped or transported, through said lines any oil or other commodity for or belonging to any other person, firm or corporation, nor has it ever made or had any contract, agreement, arrangement or understanding whereby any other person, firm or corporation has or had any right or interest in said lines or in the use or operation thereof, or of any of them. The transportation of crude oil by Appellee through its said pipe lines is and has always been merely incidental to its general business, hereinbefore described, its said pipe lines being used merely as a facility for transporting oil from Unionville, Centerbridge and Fawn Grove, where it takes delivery of and title to oil which it has purchased, to Appellee's refineries or to the point whence the oil is to be exported. Since August, 1906, Appellee has never established, charged, collected or received from itself or any other person, firm or corporation any tariff, rates or charges of any description for or in respect of the transportation of oil or other commodity through its said pipe lines or any part thereof. Appellee has no right of eminent domain or franchise as a common carrier, and has never attempted or assumed to exercise such right or franchise ; nor has it ever offered to carry or transport any oil or other commodity through its said pipe

lines for the public, or in any way held itself out to the public as a common carrier (Record, pp. 5, 6, 86, 87).

The capacities of Appellee's pipe lines and refineries are and always have been substantially balanced, and Appellee could not carry oil for other persons without either displacing a like amount of oil required in its own business or increasing the line capacity.

In the first case, any reduction in the supply of oil necessary to operate the refineries under normal conditions and to capacity would cause Appellee great loss, by reason of increased average cost of production, inability to perform contracts calling for delivery of products in definite amounts and at definite times, interrupted running and consequent deterioration in equipment, loss of skilled employees and consequent loss of efficiency of the plant, with greatly increased danger of fire and other damage, loss of uniformity in quality of products, disarrangement of the shipping system, with loss by reason of demurrage charges, and loss of business.

In the second case, the construction of an additional line with adequate pumping equipment would involve the expenditure of many thousands of dollars.

In any event, the loss entailed upon Appellee, by reason of the admixture in the lines of oils of various kinds and grades (which is always inevitable to a certain extent and would be greatly increased if Appellee were compelled to undertake the obligations of a common carrier) would be very heavy (Record, pp. 8, 79–84).

Appellee's petition is verified, as to all essential allegations, by J. A. Moffett, Vice-President of Appellee, on *personal knowledge* (Record, pp. 9, 10). So also, Appellee's moving affidavits are sworn to without qualification by Mr. Moffett and others, all of whom were in a position to have personal knowledge of the facts (Record, pp. 79–90). On the other hand, the Appellants present no affidavits except the petition of the Intervenor, the essential allegations in which, so far as

they relate to the Appellee, are in terms made upon information and belief, and except the answers of the United States and of the Commission, both of which must be considered to have been verified solely on information and belief, since neither the learned Special Assistant to the Attorney General (Record, p. 59) nor Mr. Commissioner McChord (Record, p. 79) could possibly have had personal knowledge of most of the matters set forth in said answers.

Appellee's petition and moving affidavits stand, therefore, in effect, uncontroverted.

There appear in the briefs for the United States and for the Interstate Commerce Commission, many inaccuracies of statement, which have been quite fully noticed and discussed in the brief for The Ohio Oil Company in Case No. 481, to which discussion we call the attention of the Court, contenting ourselves here with noting only a few errors which especially apply to this Appellee, the Standard Oil Company.

Brief for the Commission, p. 13: That the Standard Oil Company has eighteen refining plants. In fact, it has five such plants,—the four mentioned in the record, and one at Parkersburg, West Virginia, which does not figure in this case (Record, p. 85).

The statements as to the alleged monopolistic effect of "the practice of buying the oil for the refineries, through the pipe lines, at the wells" *(Brief for the Commission, pp. 15-20, 33)* clearly have no application in this case, since Appellee does not buy and never has bought oil at the wells, and does not use and never has used the form of contract mentioned, or anything similar thereto. Appellee buys only from dealers,

at a price delivered at its own pipe line terminals. It ships no oil through the pipe lines of other companies, and pays no transportation charges to any one, nor does it receive any (Record, pp. 86, 87).

By reason of the same facts, the statements (*Brief for the Commission, p. 23*) as to the alleged measuring and grading of oil and maintenance of public markets are likewise seen to be inapplicable to Appellee.

The statement (*Brief for the Commission, pp. 25, 59*) that public franchises are necessary for the crossing of public highways finds no support in the record and is, in fact, so far as Appellee is concerned, erroneous. At all such crossings, the pipes are laid underground, by the permission of the abutting owners, who alone can grant such privilege.

ARGUMENT ON THE LAW.

POINT FIRST.

The Interstate Commerce Act, as amended in 1906, does not apply to the Appellee nor to any owner of a private pipe line.

This point has already been fully discussed in the brief filed by The Ohio Oil Company, in case No. 481, being one of the cases in which the Government and the Interstate Commerce Commission have appealed from the decision of the Commerce Court granting a preliminary injunction against the same ruling of the Interstate Commerce Commission which is the subject of this appeal. What is said in that

brief, under the same point, in reference to The Ohio Oil Company, applies equally to the Standard Oil Company of New Jersey, except that the latter Company is a refining company, which buys crude oil delivered at the westerly terminals of its own private pipe lines and transports its own oil through such pipe lines to its refineries and the seaboard.

POINT SECOND.

As construed by the Government, the act makes common carriers of persons and corporations owning and operating private pipe lines used solely for the purpose of transporting the oil of the owners in the conduct of their private business, even though such owners have never held themselves out as common carriers, have never exercised or possessed and do not now possess any right of eminent domain, and derive no powers from State laws under which common carrier corporations are organized. It follows that the act deprives such persons and corporations of their property without due process of law, and takes it for public use without just compensation.

This point has also been fully discussed in the brief above referred to, filed by The Ohio Oil Company in case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT THIRD.

This act cannot be sustained on the theory of the United States that the operation of private pipe lines is monopolistic, that the act prohibits their operation (save as common carriers) as an appropriate means to prevent monopolistic results, and that the adoption of this means by Congress is not within the inhibitions of the Fifth Amendment.

This point has also been fully discussed in the brief above referred to, filed by The Ohio Oil Company in case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT FOURTH.

The Act cannot be sustained, as contended on behalf of the Interstate Commerce Commiseion, by resorting to the doctrine of the Elevator and Stockyards cases ; because, as applied to private pipe lines, the Act does not regulate a business affected with a public interest in the sense of those cases.

This point has also been fully discussed in the brief above referred to, filed by The Ohio Oil Company in case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT FIFTH.

Prior to the transfer to the Standard Oil Company of New Jersey of the pipe lines now owned by it, their use by the National Transit Company and New York Transit Company did not constitute them common carrier lines. But, even had they been common carrier lines, they would have been released from the obligations of common carriers upon their transfer to Appellee in 1906.

1. It appears from the statement of facts in this brief that the pipe lines in question prior to their transfer to the petitioner had been used only for the transportation of crude oil for the Standard Oil Company of New York; and that the Transit Companies had not in any way held themselves out to carry oil through the New Jersey and Maryland lines for the general public.

It is quite clear that carrying oil for a single customer would not, in itself, constitute a pipe line company a common carrier. So, also, the fact that the Transit companies were organized as common carriers in New York and Pennsylvania, did not make these companies common carriers in New Jersey, unless they were in fact carrying for the public generally in that State or were holding themselves out to do so. The Transit companies were not in fact operating the New Jersey and Maryland lines for the public, nor holding themselves out to do so, during the period prior to November, 1905.

2. But if it be assumed that the Transit Companies had used the New Jersey and Maryland lines in their "common carrier operations," then we answer that the transfer of these lines to the Standard Oil Company of New Jersey, a private corporation, organized under the laws of New Jersey, did release those lines from the obligations of a common carrier, even if—

which is not admitted—the "obligations of a common carrier" ever attach to the property employed as an instrument by the common carrier.

The lines in New Jersey and Maryland were originally acquired by private purchase for the Standard Oil Company of Ohio, which was a business corporation organized under the laws of Ohio without any right of eminent domain or any franchise or function as a common carrier. The Transit companies were not incorporated in New Jersey or Maryland, and had no right of eminent domain in these States; nor was there any law of those states investing them with any franchise or function as common carriers or imposing any obligation upon them to act as common carriers. They could therefore discontinue or abandon any business they were transacting in those states at any time. It is only when a corporation accepts a common carrier franchise from the State that it may not cease from performing its duties as a common carrier within the State without its consent. Under any other circumstances the carrier may discontinue its business, as may any mere common law carrier, and the State has no power to prevent it from doing so. That is just what the Transit Companies did when they transferred their properties to the Standard Oil Company of New Jersey. They had a perfect and indisputable right to transfer their properties, as the grantee had to acquire them for its own uses and purposes. The Standard Oil Company of New Jersey is a business corporation, without any right of eminent domain or corporate obligation to act as a common carrier. Its charter authority to lay and operate pipe lines merely confers a right, the extent of which the Company itself could fix and has fixed. Since the transfer of the lines to the Standard Oil Company of New Jersey, they have been used solely to carry its own oil in the course of and for the purposes of its own private business. That it lawfully could do, being under no obligations to the state or the public to perform the functions of a common carrier

or to appropriate the properties so acquired to any public use. The lines ceased to be common carrier lines from the moment that they were taken over by the New Jersey Company, if they had ever been such, which, as we contend, they had not.

3. The point has been expressly decided in regard to a railroad company which operated a branch line built upon private property, and subsequently transferred the branch line to the owner of such property.

In *Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed., 64 (C. C. A., 6th Circuit, 1905), an action was brought by the Appellee against the Omans to quiet the title to certain real estate, and to restrain the Appellants from asserting any interest in certain railroad tracks on said real estate or claiming the right to use the same for the shipment of their freight. The Louisville and Nashville Railroad Company had constructed and maintained the railroad tracks upon the private property of the Stone Company's predecessor, and retained the right to remove the same unless the Stone Company should desire to purchase and own them. In a suit brought in the Courts of Kentucky, it had been held that the Omans had the right to have the Louisville and Nashville Railroad Company use these tracks to transport stone from their quarry. The Court based this right on the fact that the railroad company owned and operated the switch including these tracks as a part of its general system, and, being a common carrier, was bound to transport the freight of the Omans when delivered at a reasonable point on the switch. After this decision, the Stone Company purchased the tracks from the railroad company and brought suit to quiet its title thereto. The Court said, at page 68:

> "The rails, ties, etc., constituting the tracks, were held by the railroad company as personal property. When bought by the stone company, they did not for that reason become so immovably attached to the soil as to put it beyond the power of the stone company

to treat them as it might see fit. It had the right to continue to use them as tracks, or remove them as personal property. In other words, they became the individual property of the stone company, applicable to whatever use it might put them. But the Omans claimed the right to use them as railroad tracks in the transportation of their freight. This was an assertion of an interest not only in the track material, but in the roadbed—of the right to have the tracks kept where they were, and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the stone company."

The Court also observes that the sale and transfer of the tracks did not in any way violate any public obligations of the railroad company, and that, having the right to do this, the motives which induced the action were immaterial. The right of the appellants to use the railroad tracks on appellee's property for the transportation of stone quarried by them was denied, and a decree quieting the title of the appellee was affirmed.

4. The weight of authority is also in favor of the proposition that, even where a fee simple in land is taken by condemnation, there is no reversion to the former owners when the particular use for which the land was taken ceases, and that the property may be disposed of for private uses.

Rexford v. Knight, 11 N. Y., 308, 314.
Wyoming Coal & Trans. Co. v. Price, 81 Penna. State, 156, 175.
Currie v. N. Y. Transit Co., 66 N. J. Equity, 313.

The last named case was one which involved a part of the very pipe line under consideration.

On this question, KNAPP, P. J., writing for the Court below, said in part as follows (Opinion of Commerce Court, pp. 46–48):

"The remaining contention relates to the pipe lines of the Standard Oil Company of New Jersey and is

based upon facts which, so far as deemed material, may be summarized as follows: The line from Unionville across the State of New Jersey to the Bayonne refinery was built upon private rights of way and put into operation in 1882 by the National Transit Company, which, under the terms of its charter, is a common carrier in the State of Pennsylvania. About May 1, 1894, this line was transferred to the New York Transit Company, which was incorporated under a law of the State of New York, by virtue of which it became a common carrier within that State. The line from Centerbridge to the Bayway and Bayonne refineries was built upon private rights of way and put into operation in 1897 by the National Transit Company. The line from Fawn Grove to the Baltimore refinery was likewise built upon private rights of way and put into operation about 1885 by the National Transit Company.

"The New York Transit Company was never re-incorporated in the State of New Jersey nor was the National Transit Company ever re-incorporated in the State of New Jersey or the State of Maryland. In neither of these States is there any law providing for the organization of common carrier-pipe-line companies, and neither of the corporations mentioned has ever possessed or attempted to exercise the right of eminent domain in New Jersey or Maryland. Nor has either of them, under the laws of those States or by virtue of any agreement connected with its acquisition of rights of way or otherwise, ever assumed the obligations of a common carrier or at any time acted in that capacity in the States in which the lines in question are located.

"Subsequently these three lines were sold and transferred to the Standard Oil Company of New Jersey, one of the petitioners herein. The preliminary steps appear to have been taken in November, 1905, and the sale consummated by delivery of deeds of conveyance in July, 1906. Shortly afterwards the purchaser took over the entire operation of the lines, and has since used them exclusively for transporting its own oil to the refineries mentioned; and we

assume for present purposes that this transfer was made in anticipation of the passage of this amendment or some similar law, and to avoid any undesired consequences which might follow from such legislation if the lines remained in the possession of their former owners.

" Nevertheless we are unable to see that the facts here referred to place the owner of these particular lines on any different footing from other private pipe-line companies as respects the validity of the pipe-line amendment. The former owners were never under obligation by their charters or otherwise to perform the duties of a common carrier in New Jersey or Maryland ; they never had held themselves out as common carriers in those States ; nor had either of them in fact carried oil therein except for a single customer. The fact that the transit companies were organized as common carriers in New York and Pennsylvania did not make them common carriers in New Jersey or Maryland, nor, in our opinion, would it prevent them, even if they had been carrying for the public, from discontinuing such service in the latter States and becoming therein purely private pipe-line companies. (*Weems Steamboat Co. v. People's Co., supra.*) We think it also clear that they had the right to sell these New Jersey and Maryland lines to the Standard Oil Company, that the purchaser had a right to acquire and use them exclusively in its private business, and that no public obligation was thereby assumed or public duty imposed (*Oman v. Bedford-Bowling Green Stone Co.*, 134 Fed., 64) ; and it is equally clear that neither the right of the transit companies to sell nor the right of petitioner to buy was affected by the assumed motive for the transaction. Without amplifying the argument we have no hesitation in holding that if the amendment in question is invalid as to the other private pipe-line companies, for the reasons above stated, it is equally invalid as to this petitioner and the particular lines here considered."

POINT SIXTH.

Neither the utilization by a pipe line company of the right of way of a common carrier railroad for the laying of a pipe line nor the crossing under a public highway by such pipe line impresses upon the pipe line or its owner the nature or the obligations of a common carrier.

I. As to the use of railroad rights of way.

1. Upon this point, the ruling of the Commission in its report sustained the contention of the Appellee. Mr. Commissioner Lane says :

> "While some doubt may exist as to the right by which pipe lines build upon railroad right of way, the mere fact that they are so built does not impress them with common carrier obligations" (Record, Case 481, p. 52).

And this ruling of the Commission is sustained by the Commerce Court (Record, Case 481, p. 131).

2. No part of the pipe lines operated by the Standard Oil Company of New Jersey in Maryland is laid upon any railroad right of way. About fifty-one miles, in all, of the New Jersey lines are laid upon such rights of way, in which the railroad companies had a fee simple title.

Currie v. N. Y. Transit Co., 66 N. J. Equity, 313.

3. In the *Currie* case, decided in 1903, pipe lines of the defendant were laid on a railroad right of way, which had been acquired by condemnation proceedings under the General Railroad Law of New Jersey. Suit was brought to compel the removal of the pipe line from this portion of the right of way, the plaintiff (who was the grantee of the former owner) contending that he still retained in the land condemned such an interest as

entitled him to prevent it from being used for any other than strictly railroad purposes. Chief Justice GUMMERE, writing the opinion of the Court, held that the railroad company had a title in fee simple and that the provision in the statute that such lands should be used for railroad purposes did not operate to restrict the quantity of the interest which passed to the railroad company, but merely limited the uses to which the land could be put under the railroad's charter. In other words, it was simply a question whether the railroad company was acting *ultra vires* or not in allowing pipe lines to be laid on the right of way. No one can raise the question of *ultra vires*, except the State of New Jersey, acting through its Attorney General, and the only penalty which could be inflicted would be to oust the pipe line company from the railroad right of way.

Certainly there is no apparent connection between the use of such railroad rights of way by the owner of a pipe line and the common law obligation of a common carrier.

There is no statute either in New Jersey or Maryland imposing any obligations such as those of a common carrier upon a pipe line which has been located on a railroad right of way, nor, so far as is known, any decision of any court to that effect.

4. Even if the railroad company acquired or holds its lands subject *so far as it is concerned*, to a public use, yet an easement in them which it may confer upon another, not interfering in any way with that public use, is not, by reason of such public use, impressed with *another* public use. There is no escape from the conclusion that whether the grantee is a common carrier or not is dependent upon the nature of its business, and not upon the status or business of its grantor.

The following propositions cannot be disputed. Railroad companies are companies "organized for the purpose of constructing, maintaining and operating railroads." They are given certain "franchises and privileges for public purposes,

in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or *quasi* public trust" (Elliott on Railroads, I., Sec. 1). "Franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like" (*Morgan v. Louisiana*, 93 U. S., 217, 223; Elliott, I., sec. 63). The consideration for a franchise is "the implied undertaking to perform corporate duties beneficial to the public, or it may be an express agreement to do or not to do a designated act" (Elliott, I., sec. 66). Therefore, a railroad corporation may not, without statutory authority, "transfer any of its property or privileges which are essential to a fulfillment of the purposes for which it was chartered" (Elliott, I., sec. 70). "In accepting the grant of rights and franchises from the State a railroad corporation impliedly assumed the duty of a common carrier. * * * From the fact that the company is authorized to build, maintain and operate a commercial railroad may be inferred its duties, rights and obligations as a common carrier of goods and passengers" (Elliott, IV., sec. 1392); or they may be expressly imposed.

None of these propositions applies to a refining company which, as an incident to its refining business, transports its own oil through its own pipe lines. No franchise is conferred upon it to locate its line *in invitum;* to appropriate land for it; or to take tolls. The duties, rights and obligations of a common carrier are not imposed upon it, and there is no acceptance of a franchise from which they may be inferred. It is not arguable that such consequences flow from the grant of an easement to maintain its pipe line under the surface of

the lands of a railroad company which in no way interferes with their use for the purposes or franchises of the railroad company. There is no logical connection between such an easement and the rights, duties and obligations of a common carrier as there is between such rights, duties and obligations, and the acceptance of a franchise to build, maintain and operate a railroad. In the one case, there is an acceptance of a privilege conferred by the state which necessarily involves a reciprocal obligation. In the other, there is a mere grant of a property right *inter partes* which involves no obligation other than the actual consideration for the grant. To construct out of such a grant an obligation to the public such as flows from the acceptance of a franchise to build, maintain and operate a railroad, is without any warrant in reason or principle.

5. Again, evidence as to the extent and character of the title of the railroad company or other grantor of the right of way to lay a pipe line is pertinent only as showing the extent of the easement so granted. If the grant is from an ordinary owner in fee simple (whether a railroad company which holds by private purchase or a private owner), then the extent of the pipe line easement is measured only by the terms of the grant. It is subject to no qualification based on any reserved public right. If the grant be from a railroad company which has acquired its right by way of condemnation, but which, as in the State of New Jersey, has thereby acquired a fee simple in the right of way, then the easement granted by such railroad company for the laying of a pipe line is further limited by the possible right of the State to object to the use of the railroad's right of way for pipe line purposes. But the State, in such case, could only proceed either against the railroad company, for acting *ultra vires*, or to oust the pipe line. By no possibility could such right of the State impose any servitude such as a common carrier obligation upon the pipe line. Even if the railroad company has itself only an easement to lay and maintain its tracks, which had been acquired by con-

demnation, still those facts simply further limit the easement granted for the pipe line. At most, they would give the abutting owners the right to enjoin the use of the railroad right of way for pipe lines, or to claim compensation for such servitude. Possibly also, the State would have the remedy to proceed as indicated above. But none of these circumstances could possibly make the pipe line company a common carrier. It might be a trespasser subject to all the penalties of trespass, but that would not compel it to devote its property to a public use.

II. As to highways.

1. The only manner in which any highway has been utilized by any pipe line owned and operated by the Standard Oil Company of New Jersey is by laying pipe lines below the surface, either along or across such highway. The rights to lay these pipes were acquired from abutting owners, who by law clearly had the power to grant such rights.

Our contention that no common carrier obligations are incurred by laying a pipe line along or across a highway was sustained by the Commission. Mr. Commissioner Lane says (Record, Case 481, p. 53):

> "It appears that the usual policy of the lines is to deal with the owner of the abutting property in acquiring such highway rights upon the theory that such abutting owners own also the fee in the highway, and that the public right therein is a mere easement of passage. That this is the general rule of law there can be no doubt, and the few exceptions occur in states where the question here at issue is unlikely to arise.
>
> "We are of the opinion that a pipe line is not impressed with the obligations of a common carrier merely because, by arrangement with the abutting owner, it uses a public highway for right of way purposes."

And this conclusion is concurred in by the Commerce Court (Record, Case 481, p. 131).

2. The rule seems to be universal that owners of lands abutting on a public highway have title in fee simple to the centre of the highway, subject only to the public easement of passage, and may use and grant the right to use the soil below the surface for any purpose which does not interfere with such public easement.

Barclay v. Howell's Lessee, 6 Peters (U. S. Supreme Court), 498, 513.
Starr v. Camden & Atlantic Railroad Co., 24 N. J. Law Reports, 592 (1854).
Winter v. Peterson, 24 N. J. Law Reports, 524 (1854).
Wright v. Carter, 27 N. J. Law Reports, 76 (1858).
Huffman v. The State, 21 Indiana Appellate Court, 449 (1898).
Pemberton v. Dooley, 43 Missouri Appeals, 176, 178 (1890).
Angell on Highways, 2d Ed., p. 366.

In *Barclay v. Howell's Lessee, supra*, at page 513, the Court said:

> " By the common law the fee in the soil remains in the original owner, where a public road is established over it ; but the use of the road is in the public, the owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground ; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

In *Starr v. Camden and Atlantic Railroad Co., supra*, at page 595, the Court said :

> " That a public highway is a mere easement, and that the owner of the soil over which it passes has, by the law of this state, as well as by the law of England, and of the most of the States of the Union, a right to an action of trespass against any person who interferes with it for any other purpose but to use it or repair it as a highway, is too well established to require a reference to authorities."

In *Winter v. Peterson, supra,* at page 527, the Court said:

> "The possession of the farm was possession of so much of the road as lay within its boundaries. The law has always been so. 'The king has nothing but the passage for himself and his people; the freehold and all the profits belong to the owner of the soil.' 1 Roll's Abv. 392, Letter B. pl. 1, 2. So do all the trees upon it, and the mines under it; *the owner may carry water pipes under it.*"

In *Wright v. Carter, supra,* at page 80, the Court speaking of a turnpike road, said:

> "The title of the soil is not changed—it remains as it was before, in the owner of the adjoining soil. He has precisely the same right to and control over the soil he had before the passage of the act."

In *Pemberton v. Dooley, supra,* after affirming the usual doctrine that the owner of the soil on the two sides of a country road is the owner likewise of the soil in the road, subject only to the right of a public use as a road, the Court says, at pages 179 (italics ours):

> "We conclude, then, that *plaintiff Pemberton had the right to a passway beneath the surface of the highway,* provided he in no way disturbed the public use."

3. In the State of New Jersey, the same doctrine applies to public streets in cities.

State v. Laverack, 34 N. J. Law Reports, 201, 203–4 (1870).

Weller v. McCormick, 52 N. J. Law Reports, 470, 472–3 (1890).

Roebling v. Trenton Pass. Railway Co., 58 N. J. Law Reports, 666, 670–1 (1896).

Bloomfield Gaslight &c. Co. v. Calkins, 62 N. Y., 386.

Amer. & English Encyc. of Law, 2nd Ed., Vol. 27, p. 159.

In *Weller v. McCormick*, *supra*, at page 472, the Court said:

> "The public right is paramount and includes the right to have the streets safe for travel. That of the abutting owner is subordinate to this public right. He may use the highway in front of his premises when not restricted by positive enactment for loading and unloading goods, *for vaults and chutes*, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel."

Again, at page 473; speaking of an abutting owner, the Court says:

> "It appeared, however, that he was in actual occupation as owner of the premises abutting upon the street where the tree stood, and his title and possession presumably extended to the middle of the street, subject only to the public rights."

In *Bloomfield, &c., Co. v. Calkins*, *supra*, the Court, among other rights reserved to the owner of land abutting on a highway, at page 390, mentioned a right (italics ours) "*to carry water in pipes under the highway.*"

4. The same rule prevails in Maryland, both as to public highways and public streets in cities.

Thomas v. Ford, 63 Maryland, 346 (1884).
Chesapeake & Potomac Telephone Co. v. Mackenzie, 74 Maryland, 36 (1891).

5. It is obvious, therefore, that, at least in the States of New Jersey and Maryland, the laying of pipe lines along or underneath public highways, whether in country or city, does not impose any obligations, such as those of a common carrier, upon the owners of such pipe line, or upon the pipe line itself. The utmost privilege which the public grants in such a case—if so much—is a license to disturb the surface of the

highway momentarily for the purpose of laying the pipes. Such a privilege, which would last ordinarily for only a few hours and would not necessarily involve stopping the use of the road by the public for a single moment, is altogether too slight a basis for imposing a perpetual obligation of so serious a character.

For these reasons the order of the Court below should be affirmed with directions that the injunction be made permanent.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 483.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,
against
STANDARD OIL COMPANY OF LOUISIANA,
Appellee.

BRIEF ON BEHALF OF APPELLEE, STANDARD OIL COMPANY OF LOUISIANA.

Appeal from the United States Commerce Court.

CHESTER O. SWAIN,
Solicitor for Appellee,
Standard Oil Company of Louisiana.

JOHN G. MILBURN,
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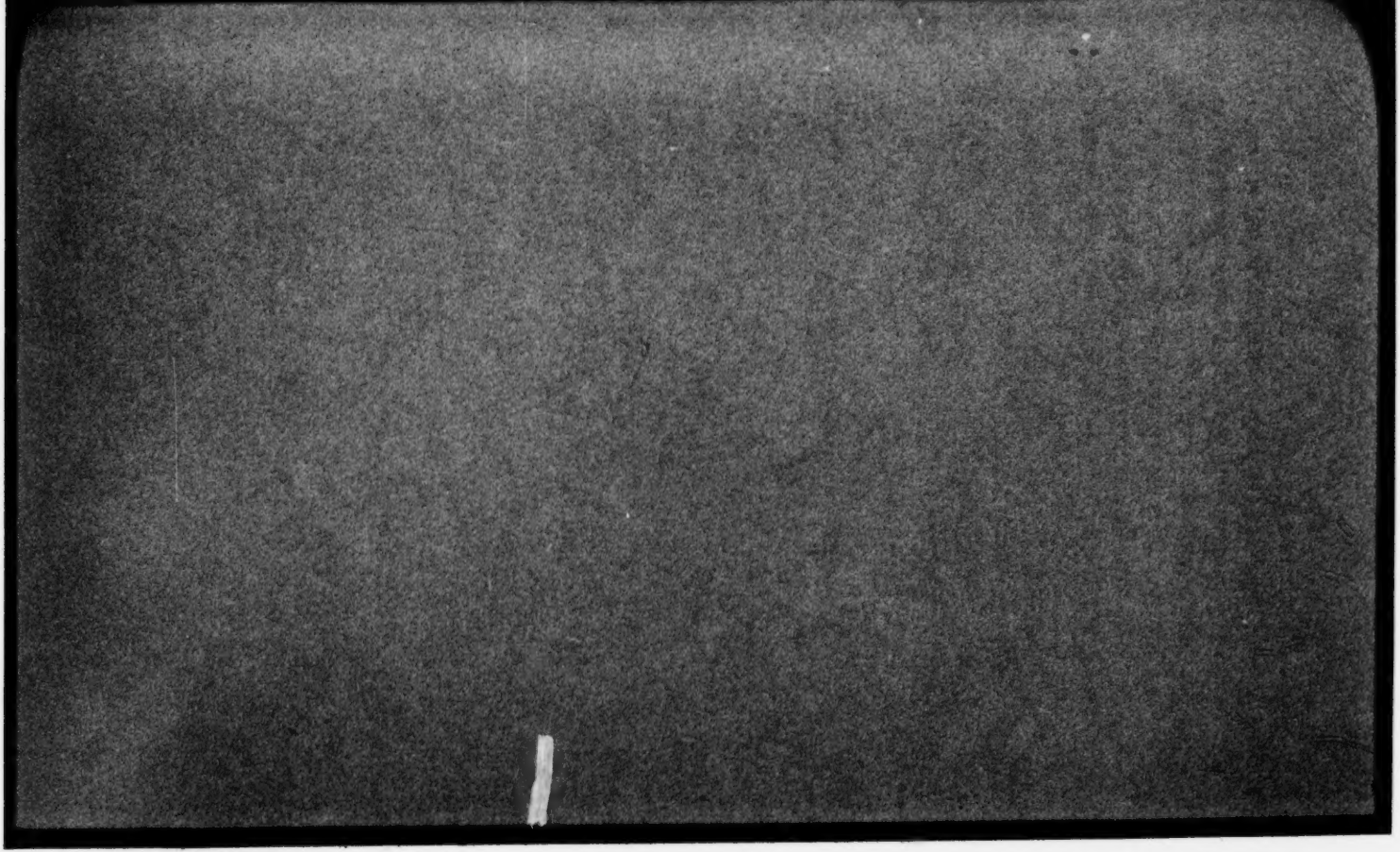

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 483.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellants,

AGAINST

STANDARD OIL COMPANY OF LOUISIANA,
Appellee.

BRIEF FOR APPELLEE.

Statement of Case.

The Appellee controverts such parts of the Statements of the Case contained in the briefs for the appellants as purport to set forth the "questions involved," and says that the questions involved in this suit are substantially as follows:

FIRST: Whether the transportation of crude oil by a refiner from his tanks to his refinery, all in the same state, by means of his own transportation facilities, where such oil has previously been purchased from a dealer in another state and delivered by said dealer from such other state into said refiner's said tanks, whereupon said refiner has paid for and taken title to said oil, constitutes interstate commerce, and

whether, in respect of such transportation of such oil from his tanks to his refinery, such refiner is engaged in interstate commerce.

SECOND: Whether the owners of private pipe lines, who have used such lines solely as facilities for carrying on their own business, who have never carried any oil but their own, have never held themselves out as common carriers, are not organized under and derive no powers from State laws under which common carrier corporations are organized, and have never exercised or attempted to exercise and do not possess any right of eminent domain, were, by the provisions of the Interstate Commerce Act, as amended June 29th, 1906, subjected to that Act and charged with the duties and obligations of common carriers, and whether, if so, the Act, as to such owners of private pipe lines, be not void as in violation of the Fifth Amendment of the Constitution of the United States.

As to the first question, the Court below made no specific finding; as to the second, it held, construing the Act as embracing within its terms the owners of such private pipe lines, that, as to them, the Act was in violation of the said Fifth Amendment and, therefore, void.

Statement of Facts.

All the essential facts were found in favor of Appellee by the court below (Opinion of Commerce Court, Record, p. 65).

The Appellee, Standard Oil Company of Louisiana, is a private business corporation, organized and existing under the laws of the State of Louisiana, with its principal office at Baton Rouge, in said State. It was incorporated in April, 1909, under act No. 78 of the acts of the Legislature of the State of Louisiana for the year 1904, and its business is, and always has been, the manufacture and sale of the products of crude petroleum (Record, pp. 1, 55).

Appellee owns and operates a large refinery at Baton Rouge, Louisiana, and ever since its incorporation has been, and is now, a large manufacturer of the products of petroleum. Appellee owns some petroleum lands in the so-called "Caddo field" in the State of Louisiana, whence it produces a large amount of crude oil, and it also buys crude oil from other producers in said field, which oil is delivered to it at said producers' wells (Record, p. 1).

At Ida, on the Louisiana side of the Louisiana-Arkansas line, Appellee owns a tract of land on which it has located storage tanks, a pumping station and discharge pipe lines. At this point, Appellee purchases and receives from The Prairie Oil and Gas Company and thereupon takes title to crude oil produced in the Mid-Continent field, which oil is pumped by said The Prairie Oil and Gas Company from its pipe line into Appellee's said tanks and thereby delivered to Appellee in fulfillment of the contract of purchase. One tank at a time is used for this purpose, and as soon as said tank is filled the pumping is, as to it, discontinued, and the oil arriving in the pipe line is diverted into another tank. The full tank is then ganged by representatives of both companies and Appellee's pumping station thereafter proceeds to draw the oil out of the tank, pass it through the pumping station and pump it south toward the refinery at Baton Rouge. Appellee's pipe line does not cross the State line into Arkansas, and in fact all its lines are located wholly within the State of Louisiana (Agreed Statement, Record, pp. 59, 60).

This description of the course of dealing at Ida is in exact accord with the agreed statement signed by counsel for the United States, and the assertions in the brief for the United States (pp. 12 and 13) as to a physically continuous transportation from the Mid-Continent field to Appellee's refinery are therefore without justification in fact. Furthermore, it appears that from and after such delivery at Ida, such oil is and has always been

disposed of by Appellee at its will, although, as a matter of fact, and naturally enough, the bulk of the oil ultimately goes to Appellee's refinery. Large quantities of said oil have, however, been sold by Appellee at points north of Baton Rouge and have never reached the refinery (Record, p. 55).

Appellee and said The Prairie Oil and Gas Company are wholly separate and distinct corporations, and the only business relations between the two companies are the purchase and delivery from time to time of needed batches of oil at Ida, as above described (Record, p. 57).

Appellee's production and purchase of crude oil in the Caddo field have together never exceeded one-third of the total production of that field, and said purchases have been made in active competition with the purchasers of the other two-thirds of such production. Its average purchases of oil produced in the Mid-Continent field have never exceeded five per cent. of the total production of that field (Record, p. 54). Seventy per cent. of the pipe line capacity is utilized in moving crude oil from the Caddo field (Record, p. 56).

For the purpose of supplying to Appellee's said refinery the crude oil produced or purchased in the Caddo field and that purchased from The Prairie Oil and Gas Company and delivered as aforesaid, and, as Appellee contends, solely as a plant facility, Appellee owns and operates a trunk pipe line about two hundred sixty-six miles long, running from Appellee's tanks at Ida to Baton Rouge, with a lateral from the Caddo field, and also a gathering pipe line system in said Caddo field, the outlet of which is the lateral line last above described. Appellee's said refinery and all of Appellee's said pipe lines have been built by Appellee since its organization. All of said pipe lines have been built on private rights of way purchased by Appellee or otherwise acquired by it through private contract. The transportation of crude oil by Appellee through its said pipe lines is and always has been merely incidental to its manufacturing and marketing business above

described, said pipe lines being used merely as a facility for transporting its own oil to its own refinery (Record, p. 2).

The theoretical capacity of Appellee's pipe line is about 11,000 barrels per day, which of course is subject to deduction for occasional shut-downs due to accidents to the line or machinery or some similar cause. During the first nine months of the year 1912, the total amount of crude oil transported through this pipe line showed a daily average of approximately 10,200 barrels, which represents practically the capacity of the line under actual working conditions. The total amount of crude oil required daily for Appellee's refinery is about 10,000 barrels, and such requirement is constantly increasing with the progress of said refinery toward completion (Record, p. 50).

Said pipe lines have always been owned and used solely and exclusively by Appellee and solely for the purpose of and in the transaction of Appellee's private business, and Appellee has never piped or transported, or permitted to be piped or transported, through its said pipe line any oil or other commodity for or belonging to any other person, firm or corporation, nor has any portion of appellee's pipe lines ever been offered to or used by any one for the carriage or transportation of oil or other commodity for hire. On the contrary, all the oil which has been piped or transported through Appellee's said pipe lines has been solely and exclusively owned by Appellee and has been used by it in the conduct of its private business. Appellee has never made or had any contract, agreement, arrangement or understanding whereby any other person, firm or corporation has or had any right or interest in said pipe lines, or in their use or operation, and Appellee has never established or charged, nor collected or received, from itself or any other person, firm or corporation, any tariff, rates or charges of any description for or in respect of the transportation of oil or other commodity through its said pipe lines or any thereof (Record, p. 2).

Appellee has never in any way held itself out to the public as a common carrier, and has no right of eminent domain or franchise as a common carrier, and has never attempted or assumed to exercise such right or franchise. On the contrary, the statute under which Appellee is incorporated, to-wit, Act No. 78 of the acts of the Legislature of the State of Louisiana for the year 1904, by section 3 thereof, expressly excludes from the provisions of said act "corporations designed to carry on any business which shall entitle the corporation designated to exercise the power of eminent domain" (Record, pp. 2, 3).

The capacities of Appellee's pipe line and refinery are, and always have been, substantially balanced, and appellee could not carry oil for other persons without either displacing a like amount of oil required in its own business or increasing the line capacity.

In the first case, any reduction in the supply of oil necessary to operate the refinery under normal conditions and to capacity would cause Appellee great loss, by reason of increased average cost of production, inability to perform contracts calling for delivery of products in definite amounts and at definite times, interrupted running and consequent deterioration in equipment, loss of skilled employees and consequent loss of efficiency of the plant, with greatly increased danger of fire and other damage, disarrangement of the shipping system, with loss by reason of demurrage, and loss of business.

In the second case, the construction of an additional line with adequate pumping equipment would involve the expenditure of upward of $2,000,000.

In any event, the loss entailed upon Appellee by reason of the admixture in the line of oils of various kinds and grades (which is always inevitable to a certain extent, and would be greatly increased if Appellee were compelled to undertake the

obligations of a common carrier) would be large (Record, pp. 4, 5, 50–52).

It seems proper, in closing this statement, to direct the attention of the Court to the fact that the answer of the United States was verified by Mr. Blackburne Esterline, Special Assistant to the Attorney-General (Record, p. 40), and that of the Interstate Commerce Commission by Mr. Commissioner McChord (Record, p. 48), both, in the main, on what is stated to be information and belief. Neither of these gentlemen had, or could have had in the nature of things, personal knowledge of the matters covered by the denials and allegations contained in said answers. On the other hand, Appellee's petition and affidavit, the latter of which meets and controverts the allegations of said answers, were sworn to by Mr. F. W. Weller, President of Appellee, a man of long experience in the oil business and familiar with all departments of Appellee's affairs (Record, pp. 6, 49, 50, 58), his verification being, as to all essential matters, on personal knowledge.

Appellee's petition and moving affidavit stand, therefore, in effect, uncontroverted.

ARGUMENT ON THE LAW.

POINT FIRST.

The appellee is not, in respect of the transportation of oil through its pipe lines, engaged in interstate commerce and is therefore not subject to the Interstate Commerce Act, whatever may be the determination of the Court as to the construction or constitutionality of that Act as applied to corporations whose pipe lines transport oil between states.

The agreed statement (Record, pp. 59, 60) and the affidavit of F. W. Weller (Record, pp. 52–57), the allegations of which stand uncontroverted, disclose all the facts bearing upon this question, and nothing beyond a brief outline of the course of dealing is necessary in this place.

Appellee's pipe lines are located wholly within the State of Louisiana, and receive and transport crude oil from two sources—oil produced or purchased by Appellee in the Caddo field, in Louisiana, and Mid-Continent oil, purchased by Appellee from The Prairie Oil & Gas Company delivered in Appellee's tanks near Ida, in the State of Louisiana.

As to Caddo oil, no question can possibly be made but that the transaction is from first to last an intrastate one. The attempt to subject Appellee to the statute must be sustained, if at all, on that part of its business which has to do with Mid-Continent oil. That oil Appellee receives and takes title to in its own tanks in Louisiana, into which the oil is delivered by the seller thereof, by means of his own facilities.

The primary purpose of Appellee in building and operating its line from Ida to Baton Rouge was to supply its refinery with Mid-Continent crude, and naturally the greater part of the oil received at Ida does go to the refinery; never-

theless, it appears that said oil belongs to Appellee to do with as it wishes and that not all of it eventually reaches the refinery, Appellee having sold large quantities at points north of Baton Rouge (Record, p. 55).

The situation thus presented is, we conceive, in contemplation of law precisely like that of a dealer in raw material who has a place of business in Jersey City and a manufacturer who has a warehouse on the New York City water front and a factory at, we will say, Fourteenth Street and Third Avenue. The manufacturer buys raw materials from the dealer, f. o. b. the manufacturer's warehouse, and the dealer fulfills his contract by loading the goods into his own lighter and delivering them into said warehouse. That lighterage movement is, of course, an interstate one; but when the goods are placed in the warehouse, that movement has been completed and then, for the first time, the manufacturer has title to and control of the goods. Thereafter, he may dispose of them at will, although, in the natural course of his business, he loads the bulk of them into his own trucks and carries them to his factory as and when they are needed, to be converted into the finished product.

We are aware of no case which holds that under such circumstances the transportation of the goods in the manufacturer's trucks from his warehouse to his factory constitutes interstate commerce. That the law is to the contrary we believe is clearly established by the case of *Gulf, Colorado & S. F. Ry. Co. v. Texas*, 204 U. S., 403, as stated and explained in the later case of *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S., 111, from pp. 127–130, of which we quote as follows (italics ours):

> "Its facts were as follows: The Hardin Grain Company, doing business in Kansas City, Missouri, having made a contract with parties at Goldthwaite, Texas, for the delivery of two car loads of corn at that place, in

order to comply with their undertaking, contracted to purchase of the Harroun Commission Company, who were also doing business at Kansas City, Missouri, and had an agent at Texarkana, Texas, the same quantity of corn, to be delivered at the latter point. The corn with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Texas, through Kansas City, Missouri. It was delivered at Texarkana, Texas in accordance with the agreement, to the Hardin Grain Company who, thereupon shipped it in the same cars, without breaking bulk, over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Texas. * * * The Supreme Court of the State * * * decided that the carriage from Texarkana to Goldthwaite 'should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City'. In other words, the court divided the commerce into two parts, one, the carriage from South Dakota and Kansas City to Texarkana, terminating by the delivery of the corn there to the Hardin Grain Company; and, one, which the court regarded as independent of and disconnected from the other, from Texarkana to Goldthwaite upon a bill of lading by which the railway company acknowledged the receipt from the Hardin Grain Company at Texarkana with orders to deliver to Saylor & Burnett at Galveston, Texas. This carriage, being wholly within the State, was pronounced to be a local shipment.

This court affirmed the judgment and decided that *the contract between the Hardin Grain Campany and the Harroun Commission Company was completed in accordance with its terms when the corn was delivered to the Hardin Company at Texarkana.* '*Then and not till then*', it was said, '*did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.*' Then, and not till then, we may say, did the Hardin Company acquire the means of fulfilling its contract with Saylor & Burnett; and then, and not till then, did it start to fulfill its contract with Saylor &

Burnett. This was the determining circumstance both in the Supreme Court of Texas and in this Court. It caused the Supreme Court of Texas to decide that the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City. It caused this Court, in effect, to adopt that ruling and to consider the corn not at any time to be that of Saylor & Burnett until it was started from Texarkana to Goldthwaite. It appeared that the corn remained five days in Texarkana, and, considering the bearing of this fact and the other facts, it was said: '*The Hardin Company was under no obligation to ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Grain Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Grain Company. Then, and not till then, did the Hardin Grain Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.*'

It is manifest that these facts were the determining ones, and *the history of the corn prior to its arrival at Texarkana was put aside as irrelevant and the controlling fact decided to be that corn belonging to the Hardin Grain Company was shipped from Texarkana to Goldthwaite, a strictly local shipment.* This was the view taken of the case in *Ohio Railroad Commission v. Worthington, supra.* * * * Distinguishing the case, it was said (p. 109): 'It is evident from this statement of facts that the case is quite different from the one under consideration. *There a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed.*'"

That the instant case is much stronger than the *Texas* case, *supra*, is evident from the following facts:

The delivery at Ida is made by the seller itself into Ap-

pellee's tanks, and Appellee takes and retains complete physical custody of the oil—instead of a mere constructive custody through an agent's possession of the bill of lading, followed by a re-consignment in the same cars, without breaking bulk. Furthermore, we have here the intervention of no carrier or other third party, the Appellee simply removing its own oil from its own tanks through its own pipe line to its own refinery at its convenience and as its business requires.

POINT SECOND.

The Interstate Commerce Act, as Amended in 1906, does not apply to the Appellee nor to any owner of a private pipe line.

This point has already been fully discussed as Point First in the brief filed by The Ohio Oil Company, in case No. 481, being one of the cases in which the Government and the Interstate Commerce Commission have appealed from the decision of the Commerce Court granting a preliminary injunction against the same ruling of the Interstate Commerce Commission which is the subject of this appeal. What is said in that brief, under the same point, in reference to The Ohio Oil Company, applies equally to the Standard Oil Company of Louisiana, except that the latter Company is a refining company which produces and purchases crude oil in Louisiana as hereinbefore stated, and transports it own oil through its own private pipe lines to its refinery at Baton Rouge.

POINT THIRD.

As construed by the Government, the Act makes common carriers of persons and corporations owning and operating private pipe lines used solely for the purpose of transporting the oil of the owners in the conduct of their private business, even though such owners have never held themselves out as common carriers, have never exercised or possessed and do not now possess any right of eminent domain, and derive no powers from State laws under which common carrier corporations are organized. It follows that the Act deprives such persons and corporations of their property without due process of law, and takes it for public use without just compensation.

This point has also been fully discussed as Point Second in the brief above referred to, filed by The Ohio Oil Company in case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT FOURTH.

This Act cannot be sustained on the theory of the United States that the operation of private pipe lines is monopolistic, that the Act prohibits their operation (save as common carriers) as an appropriate means to prevent monopolistic results and that the adoption of this means by Congress is not within the inhibitions of the Fifth Amendment.

This point has also been fully discussed as Point Third in the brief above referred to, filed by The Ohio Oil Company in

case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT FIFTH.

The Act cannot be sustained, as contended on behalf of the Interstate Commerce Commission, by resorting to the doctrine of the Elevator and Stockyards cases; because, as applied to private pipe lines, the Act does not regulate a business affected with a public interest in the sense of those cases.

This point has also been fully discussed as Point Fourth in the brief above referred to, filed by The Ohio Oil Company in case No. 481. Reference to that brief is hereby made for the arguments in support of this point upon which this Appellee relies.

POINT SIXTH.

The crossing under a highway by a pipe line does not impress upon that pipe line the nature or obligations of a common carrier.

This point has been carefully argued, with many citations of authorities, in the brief for the Standard Oil Company of New Jersey, as a part of Point Sixth in such brief, reference to which is hereby respectfully made.

The general doctrine held in the cases cited in that brief is also that of the Louisiana courts. We therefore confine ourselves to adding a few leading authorities in that State upon the point.

Hatch v. Arnault, 3 La. Ann., 482, at p. 486.
Mendez v. Dugart, 17 La. Ann., 171, at p. 173.
Bradley v. Pharr, 45 La. Ann., 426, at pp. 430, 432.

In *Bradley v. Pharr, supra,* the Court, at page 430, says:

> "Article 658 of the Revised Civil Code provides: 'The part of an estate upon which a servitude is exercised does not cease to belong to the owner of the estate; he who has the servitude has no right of ownership in the part but only the right of using it. Hence the soil of public roads belongs to the owner of the land on which they are made, though the public has the use of them."

Again, at page 432:

> "The authorities as to the rights of abutting proprietors are collated by Mr. Elliott and they fully recognize the broader character of their rights than those accorded to the mere citizen and accord to him, or owner of the fee, subject only to the public easement, all the ordinary remedies of an owner, including trespass, ejectment and injunction in cases where his rights are unwarrantably invaded. Elliott on Streets, and R., pp. 536, 308, 310; see also 3 Kent's Com., 11th Edition, p. 548; Angell on Highways, sec. 319.
>
> "The law of Louisiana is even more liberal on this subject."

For these reasons the order of the Court below should be affirmed with directions that the injunction be made permanent.

CHESTER O. SWAIN,
Solicitor for Appellee.

JOHN G. MILBURN,
M. F. ELLIOTT,
CHESTER O. SWAIN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA ET AL., APPELLANTS, *v.* THE PRAIRIE OIL AND GAS COMPANY, APPELLEE.	No. 1053.
UNITED STATES OF AMERICA ET AL., APPELLANTS, *v.* UNCLE SAM OIL COMPANY, APPELLEE.	No. 1054.
UNITED STATES OF AMERICA ET AL., APPELLANTS, *v.* ROBERT D. BENSON ET AL., APPELLEES.	No. 1055.

ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Attorney General, on behalf of the United States, and moves the court to advance the above-entitled cases for hearing on Tuesday, October 14, 1913, to be heard with the three similar cases already advanced for hearing on that day.

86868—13

The appeals are from the interlocutory order or decree of the Commerce Court of March 14, 1913, granting a preliminary injunction against the order of the Interstate Commerce Commission directing the appellees, as common carriers, to publish and file their schedules of rates and charges for the transportation by means of pipe lines of crude oil in interstate commerce.

The same order of the Commerce Court was appealed from in *United States v. Ohio Oil Company*, No. 1012; *United States v. Standard Oil Company*, No. 1013; and *United States v. Standard Oil Company of Louisiana*, No. 1014, October Term, 1912. The hearing of those appeals is set for October 14, 1913. The present appeals and those appeals involve the same questions. The Commerce Court heard the six cases together and disposed of them in a single opinion.

Due notice of this motion has been served upon counsel for the respective appellees.

JAMES C. MCREYNOLDS,
Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

APRIL 9, 1913.

○

14

Office Supreme Court, U. S.
FILED.
OCT 10 1913
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants.

vs.

THE PRAIRIE OIL AND GAS COMPANY,
Appellee.

No. 506

APPEAL FROM THE UNITED STATES COMMERCE COURT

BRIEF ON BEHALF OF THE PRAIRIE OIL AND GAS COMPANY

W. S. FITZPATRICK,
J. B. F. CATES,
L. W. KEPLINGER,
C. W. TRICKETT,
Solicitors for Appellee.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants.*	No. 506
vs.	
THE PRAIRIE OIL AND GAS COMPANY, *Appellee.*	

APPEAL FROM THE UNITED STATES COMMERCE COURT

BRIEF ON BEHALF OF THE PRAIRIE OIL AND GAS COMPANY

STATEMENT OF FACTS.

The Prairie Oil and Gas Company was organized as a corporation under the general corporation laws of the State of Kansas. It is authorized under its charter to

explore for, mine, produce, purchase, sell, store, refine and transport petroleum, and to explore for, mine, produce, purchase, sell and transport natural gas.

Its principal place of business is Independence, Kansas, where its general offices and its general officers are located. It was incorporated with a capital of $300,000.00; in May, 1904, its capital was increased to $2,500,000.00; in June, 1905, from $2,500,000.00 to $7,500,000.00; in June, 1906, from $7,500,000.00 to $10,000,000.00; in December, 1907, its capital was further increased from $10,000,000.00 to $20,000,000.00; it has now issued and outstanding $18,000,000.00 of its capital stock, which was sold for cash at par. None of the increases of its capital stock represents stock dividends.

At the time The Prairie Oil and Gas Company was organized with a capital of $300,000, it owned some producing properties in the vicinity of Neodesha, in Wilson County, Kansas and certain oil and gas leases on quite an extensive acreage of land in Wilson, Neosho, Montgomery and Chautauqua Counties, in the State of Kansas. It was engaged in the producing of oil from the wells it then owned, in drilling additional wells throughout the territory in which it held leases, purchasing oil from other producers, and gathering by means of pipe lines the oil produced by it and purchased from others into its tankage in the vicinity of Neodesha, Kansas.

There was at that time a small refinery owned and operated by The Standard Oil Company, a Kansas corporation, located at Neodesha, Kansas, providing the

only market for the crude oil then being produced in what is now known as the Mid-Continent Field. During the years 1901-2-3, discoveries of oil in various parts of Kansas and the Indian Territory, now the State of Oklahoma, very materially extended the producing area of the Mid-Continent Field, with the result that there was offered to and bought by The Prairie Oil and Gas Company a large amount of oil, in excess of the local market demands and requirements, the taking and purchase of which made necessary the construction of lines of pipe to the wells in the various producing sections of the field for the purpose of gathering and collecting oil produced and purchased by The Prairie Oil and Gas Company in the course of its business.

In the month of April, 1904, there was a daily production of the Mid-Continent Field of between eleven and twelve thousand barrels, which was far in excess of the capacity of the Neodesha refinery, and there was no other market in the State of Kansas, or otherwise, for the sale of Mid-Continent oil. At that time The Prairie Oil and Gas Company had erected a number of steel tanks in Kansas, and had accumulated a stock of about one and three-quarter million barrels of crude oil, and was accumulating stock at the rate of two hundred seventy-five thousand barrels per month.

There was no pipe line engaged in the business of carrying oil for hire within the State of Kansas, or leading to any market outside the state from any part of the Mid-Continent Field. The Prairie Oil and Gas Company, wishing to sell its oil, was under the necessity of providing for itself, at its own expense, adequate means

and facilities for transporting its product to such customers as it could procure and to such markets as offered an opportunity for the sale of its products.

With that end in view it undertook and completed between the first day of April, 1904, and the first day of November, 1904, the construction of an eight-inch line from its tank farm in Allen County, in the State of Kansas, to an oil refinery owned by The Standard Oil Company, an Indiana corporation, at Sugar Creek, near the City of Kansas City, in the State of Missouri. In the meantime the daily production in the Mid-Continent Field had increased to more than twenty thousand barrels, and the Company had accumulated a surplus in stock to the amount of more than four million, two hundred forty-three thousand barrels. It was then accumulating stock at the rate of approximately one-half million barrels per month, notwithstanding the increased market for its oil resulting from the construction of its pipe line to Sugar Creek.

The character of the oil produced in the Mid-Continent Field is such that it does not make a safe, reliable and economical fuel in its crude state, and no market for its crude oil could be had except for refining purposes. There was a large oil refinery at Whiting, Indiana, owned by The Standard Oil Company, an Indiana corporation, and at Griffith, Indiana, there was a pipe line owned by the Indiana Pipe Line Company, which had facilities for delivering oil to a number of large refineries east of that point. The Company ascertained that it could sell oil to the Whiting Refinery and others east of Griffith in substantial quantities, if

it could only provide a means of delivering its oil to the Indiana Pipe Line Company at Griffith, Indiana.

There was at that time no pipe line available for the transportation of this Company's oil nearer than the one above mentioned at Griffith, Indiana, and it became and was necessary, in the prosecution of its business of producing, buying and selling crude oil, for this Company to extend its pipe line from a point in the vicinity of Kansas City, Missouri, to a connection with the pipe line of the Indiana Pipe Line Company at Griffith, Indiana.

In order to carry on its business and build its pipe line to Sugar Creek, Missouri, it was necessary, on the second day of May, 1904, to increase its capital stock from $300,000.00 to $2,500,000.00. Likewise the extension of its pipe line to Griffith, Indiana, together with other rapid expansion and extensions of the Company's business, it was found necessary on May 15th, 1905, to further increase its capital stock from $2,500,000.00 to $7,500,000.00, and again, on June 26th, 1906, from $7,500,000.00 to $10,000,000.00.

The extension of the pipe line to Griffith, Indiana, was begun in the month of October, 1904, and completed about the first of October, 1905.

The pipe lines above mentioned, and all the pipe lines of the Company, have been constructed of material and upon rights of way purchased and paid for by private contract. There is not now and never has been any law in either the States of Kansas, Missouri, Iowa, or Illinois, authorizing the condemnation of a right of way for pipe lines or the exercise by private corporations

of any right of eminent domain in connection with or on account of the location, construction or operation of a pipe line for the transportation of oil.

The Company, under the circumstances as above set out, constructed its pipe lines for its own use and to meet the necessities and requirements of its own business. It has never transported any oil for any other person. It has never offered or indicated a willingness to do so. In fact, it has never had, and does not now have, any facilities that could be used in the transportation of oil for any other person, without serious and irreparable injury to its own business, as now engaged in and conducted. It has accumulated a supply of stock of oil, amounting at the present time to approximately forty million barrels. It has outstanding contracts with producers of oil throughout all parts of the Mid-Continent Field, under which it is tendered and required to buy, approximately seventy thousand barrels of oil per day.

The oil purchased by this company is taken into its lines and into its possession under the terms of written contracts, in substance and for as follows, to-wit:

January 1st, 1909.

To The Prairie Oil & Gas Company.

The undersigned certify and guarantee that they are the legal owners of Wells Nos. 1 and up on the John Doe Farm, N E ¼ Sec. 26, Twp. 24, R. 14 E Summit Township, Montgomery County, State of Kansas, including the royalty interest, and until further notice you will give credit for all oil received from said wells as per directions:

Credit to.	Division of Interest.	Post Office Address.
Blue Sky Oil Company	W. I. 7/8	Gray Point, Kansas.
John Doe	Royalty 1/8	Doeville, Kansas.

The Prairie Oil and Gas Company is hereby authorized, until further notice to receive oil from said wells for purchase from said parties severally in the proportions named, subject to the following conditions:

First. The oil run in pursuance of this division order shall become the property of The Prairie Oil and Gas Company as soon as the same is received into its custody.

Second. That oil received in pursuance of this division order shall be paid for to the well owners or their assigns in proportion to their respective interests shown above, at the market price paid by The Prairie Oil and Gas Company for the same kind and quality of oil on such day, within two months after said oil is run, on which the owner shall notify The Prairie Oil and Gas Company of his election to take said price for the same, or in case the owner shall make no election within two months after the oil is run, then at the market price as aforesaid at the opening on the first business day after the expiration of said two months.

Third. The Prairie Oil and Gas Company shall deduct three per cent from all oil received from wells into its custody, on account of dirt and sediment, and,

in addition shall deduct one-twentieth of one per cent for each degree of artificial heat above normal temperature to which said oil shall have been subjected, and oil shall be steamed when necessary to render it merchantable.

Fourth. The undersigned agree, in case of any adverse claim of title to furnish The Prairie Oil and Gas Company satisfactory evidence of title, or in case of failure to do so, to furnish satisfactory indemnity, upon reasonable demand, against such adverse claim or claims, and that the said The Prairie Oil and Gas Company may retain the purchase price of the oil until we do so, or until the dispute as to ownership is settled.

BLUE SKY OIL CO.,
By DICK ROE, *President.*
JOHN DOE.

Witness:
OSCAR CORNTASSEL,
WILLIAM LAUD.

At the time of the delivery of such oil, so purchased, into the pipe lines of this Company, there is delivered by a representative of the Company, styled "a gauger," a receipt called a "Run Ticket" showing certain facts from which the amount of oil taken can be accurately determined, "Run Ticket" is in substance and form as follows, to-wit:

Dist. No. 1. January 5th, 1909.
Ticket No. 8.
Blue Sky Oil Company, Owner of Well Nos. 1 and up.
John Doe Farm.

Tank No. 2525			Feet	Inches	Office Calculations
	Oil	First Meas't	7	2	
Size 250		Second Meas't	1	—	
Steamed 92 degs.	B. S.	1st M.	—	10	
		2d M.	—	10	185 Bbls.
Cold 60 degs.	Water	1st M.	—	1	
		2d M.	—	1	

By Wm. Wilder.

Station Cameron.

Remarks: None.

Operator's Check
C. K.

Time { 1st Meas't / 8 A. M. } Hiram Green, Gauger. John Smith, Well Owner's Witness.

Time { 2nd Meas't / 4 P. M. } Hiram Green, Gauger. John Smith, Well Owner's Witness.

This Ticket covers all claims for allowance. The oil represented by this ticket was received and run as the property of The Prairie Oil and Gas Company. 015798

It owns in its own right a large number of producing oil wells, with a production of approximately twelve thousand barrels per day. These wells, like the wells of its customers, whose oil it is bound under contract to take and buy, require that they should be operated continuously to avoid irreparable injury to the wells as producing properties. It has outstanding contracts for the daily delivery of approximately 100,000 barrels of oil per day to its customers, who purchase crude oil

from it, and its pipe-line facilities are taxed now, and have been since their construction, to their full capacity in carrying this Company's oil to points where the same can be delivered under existing contracts for such deliveries.

All its capital is employed in that business and it has never engaged or offered to engage in any other business on its own account or in any business for any other person.

There is this distinction to be noted between the case of the Prairie Oil & Gas Company and that of some of the other companies affected by the order of the commission, now sought to be enjoined. *The Prairie Oil & Gas Company had its pipe lines completed and its system was and for years had been in operation before the amendment of June,* 1906, *was adopted.*

Questions Involved.

The questions involved are as to the proper construction, application and effect of the language used in Section 1 of the Act of June 29, 1906, amendatory of Section one of the Interstate Commerce Act of February 4th, 1887. The appellants claim that this amendment brings the pipe line owner within the provisions of the Interstate Commerce Act, whether such owners were common carriers or not, while the appellee claims that the amendment was made for the purpose of extending the operation of that act to those pipe line owners "who should be considered and held to be common carriers within the meaning and purposes" of the act.

Second. But the petitioner further claims that if

it shall be held that the amendment of 1906 was intended to apply to pipe line owners who never were common carriers, that the law is in violation of the Fifth Amendment to the Federal Constitution when sought to be applied to exclusively private lines theretofore constructed and in operation, which never were, and never were intended to be common carriers.

More specifically stated the questions to be considered are:

1. Are private property and the rights of its owners to its exclusive use, property which cannot be taken away without compensation?

2. Has Congress power to regulate a business not affected with a public interest?

3. Does the fact that the act in question was in the exercise of the police power render the fifth amendment to the Federal Constitution inapplicable?

4. Does the fact that the mere use, as distinguished from absolute title, is appropriated, prevent the application of the fifth amendment?

5. Is a law which compels the owner of a private pipe line, against his will, to become a common carrier of oil, a regulation of such business which Congress has power to make?

6. Has Congress power to legislate for the prevention of monopoly in the purchase of a commodity which at the time of the sale, is not, and which may never become the subject of interstate commerce?

7. As a means for the prevention of monopoly, can one be compelled to engage in a new line of business against his will?

8. When property is taken, for a public use, can the right of the owner to receive compensation be made to depend upon conditions?

9. Is compensation for the use of property after it has been taken, compensation for the property taken within the meaning of the fifth amendment to the constitution?

10. Is the fourteenth amendment to the Federal Constitution violated by requiring one to engage in a particular business against his will?

The Intent of the Act.

Opposing counsel say the prevention of monopoly was the intent of the amendment. Monopoly of what? Not in transportation, for one has a right to a monopoly in the transportation of his own oil. The alleged monopoly of which counsel complain is a monopoly in the purchase of oil. If such were the intent, then the amendment applies to cases which are not within the reason of the law. The pipe line owner may not be a purchaser at all or he may prefer to quit purchasing rather than employ his capital in the service of his competitors. And yet this amendment as construed will compel him to become a common carrier. Again, if such be the reason for the law, it should apply only to localities where the pipe line owner and oil purchaser has or may have a monopoly in the purchase of oil. But the company we represent neither has nor can have such monopoly in most of the territory where it purchases oil. It has powerful competitors, and whatever prices it pays for oil are determined by the laws of competition.

Our case does not come within the reason of the amendment as construed by appellant, therefore such construction should not be adopted, if the language used will admit of any other construction and if no other construction is admissible, then the amendment is arbitrary and void as to the Prairie Oil and Gas Company.

Again. To require one to engage in and employ his resources in some line of business radically different from that in which he wishes to engage would be a most startling innovation upon the common law and would deprive the pipe line owner of his liberty and be in contravention of the 14th amendment. Waiving for the present any question as to the power of Congress so to do, such an intent will not be imputed to Congress if the language used will admit of any other construction.

There are cases where the legislature has undertaken to say what provisions shall be inserted in certain contracts when actually and voluntarily made also cases where the making of certain contracts is forbidden except upon certain conditions, but this is the first instance to our knowledge where a party engaged exclusively in his own private business, which is not affected with a public interest, is compelled to enter into contracts by which he engages himself and his resources in the service of his competitors in business.

The Language Used.

If the intent had been as claimed, there was no occasion for adding the words, "who shall be considered and held, etc." The expression, "the provisions of this act shall apply to any corporation or person, or persons, en-

gaged in the transportation by pipe lines," though not by any means the form of expression that would naturally have been used if the intent had been to require every one who used a pipe line in the conveyance of his oil to become a common carrier, might well be claimed to have that effect. Section 6 required all to whom the act applied to file a schedule of rates and charges and this could only be done by proceeding to have rates and make charges. In this roundabout way this part of the amendment might be construed as requiring every one who used a pipe line in his own business to become a carrier for the public. In the light of the conditions existing at the time of the adoption of the amendment, the addition of the relative clause which closes the sentence renders the construction less rather than more admissible only those who had rates and were making charges could comply with Section 6 of the act amended by making a schedule of rates and charges. At the time of the adoption of the amendment some pipe line users had rates and charges, and the relative clause with which the sentence closes, limited the general scope of the first clause in the sentence to those which should be considered and held to be common carriers, and these were the only ones that had rates and charges and these were the only ones that could comply with Section 6 of the act. As construed by us, the "who shall be considered" clause appears where it naturally would at the close of the sentence and as qualifying and limiting the generality of the main provision immediately preceding. If appellant's construction be correct, the amendment was framed after the fashion of a letter in which the essential part is found in the postcript.

As further negativing the construction contended for, we call attention to the words "engaged in the transportation of oil." "Engaged in the transportation of oils" manifestly means engaged in the transportation of oil as a business. The business of The Prairie Oil and Gas Company is the production, purchase and sale of oil. True, the transportation of oil is mentioned in its charter as one of the purposes for which it was formed, but the insertion of that word in the charter among its enumerated purposes, for which it was formed, was not necessary to enable it to transport its own oil to market.

The Conditions at the Time.

The conditions existing at the time of the enactment of the law may be considered in construing the act. At the time of the adoption of the amendment in question, the act amended applied not to all, but to some common carriers. It did not apply to any pipe line owners even though they were common carriers. At that time there were pipe lines which were used in the transportation of oil. The extremely technical question had been raised as to whether or not one who conveyed oil by means of a pipe line even for the general public was a common carrier.

Columbia Transit Co. v. *Commonwealth*, 90 Pa. 307.

Again, there were pipe lines used in the transportation of oil which were nominally common carriers by virtues of statutes so declaring but which it was claimed were not so operated by reason of prohibitive charges that were made for the transportation of oil. See report

of the commissioner of corporations transmitted to congress May 2d, 1906 of which the following is an extract.

> "Chief among the advantages, which, aside from the present railroad discriminations, the Standard possesses are the immense pipe-line systems of the company which enable it at low cost to collect crude oil at highly favorable locations for refining. The great majority of the competitors of the Standard are located in, or very near to, oil producing territory and are thus dependent upon railroads for transportation of oil almost the entire distance from the wells to the final consumer. The Standard Oil Company, on the other hand, often transports its crude oil hundreds of miles in pipe lines in order to refine it at points much nearer to consuming markets. The advantages of a pipe line over a railroad in the transportation of oil can hardly be overestimated. * * * In the first place, while the pipe lines of the Standard in the Northeastern states are nominally common carriers, the independent refiners cannot avail themselves of these pipe lines to transport crude oil to strategic points, like the seaboard, or in the vicinity of Chicago, because of prohibitive charges. Rail rates on crude oil, instead of being reduced to put the shipper more nearly on a par with the owners of trunk pipe lines, have usually been kept as high as the rates on more valuable refined products and have even been advanced in some cases after the Standard Oil Company began to operate its pipe lines."

Also there were cases where it was claimed that by reason of the fact that pipe line owners had in fact, or had authority to avail themselves of eminent domain acts, therefore they were under obligation to become common

carriers. At that time, many of the oil producing states had authorized pipe line corporations to exercise the rights of eminent domain, but such had not been done by the states of Illinois, Iowa, Missouri, Kansas or the Territory of Oklahoma.

It was under these conditions that the amendment was adopted, which reads as follows: "This act shall apply to any person engaged in the transportation of oil by means of pipe lines * * * who shall be considered and held to be common carriers within the meaning and purpose of this act." The somewhat extended qualifying and descriptive words indicated by the asterisk in the above quotation are calculated to conceal the nature of the relation sustained by the relative clause following the asterisk to its antecedent. But for the several successive distinct words and phrases in the omitted portion represented by asterisks, it may safely be asserted, in the light of these conditions, then existing as above stated, the comma preceding the relative clause would have been omitted. The sentence would then have read: "The provisions of this act shall apply to any corporation engaged in the transportation of oil by means of pipe lines who shall be considered and held to be common carriers within the meaning of this act." The "this act" referred to, of which the amendment was made a part, could only be applied to such persons and companies as did in fact perform, or were under legal obligation to perform some service for which charges could be made since they alone could file the schedule of rates and charges required by the sixth section of the act. The relative clause in question contained in the amendment

should be construed in close connection with this requirement found in the 6th section, that a schedule of the rates and charges should be filed.

So radical an innovation upon the common law and so grave an interference with the natural rights of man to refuse to go into a business against his will, as is contended for by the government ought not to depend upon the presence or absence of a comma.

That punctuation will be disregarded "if taking the instrument by its four corners and looking to all its provisions, a judicial construction points to an intention different from what mere punctuation indicates." *In re Irvine*, 13 Fed. Cases, No. 7086.

"That punctuation is a most fallible standard to interpret a writing." *Ewing* v. *Burnett*, 11 Pet. 54.

We submit that no more appropriate place can be found for an application of the rule which requires the utter disregard of punctuation when necessary to prevent injustice. *U. S.* v. *Voorhees*, 9 Fed. 143. *Cushing* v. *Warrick*, 75 Mass. 382

If the intent had been to make every pipe line owner who used pipe exclusively for the conveyance of its own oil a common carrier, or if it intended to deny a pipe line owner the right to use pipe in his transportation of his own oil unless he also received and transported for the general public, it would have been an easy matter to have said just that thing. Had such been the intent the language used to indicate so radical an innovation would naturally have been such as to have directed the attention of every member to that fact.

"That it would have been easy to say so," is a princi-

ple that has often been applied against a construction not directly and positively expressed.

Tillson v. *U. S.*, 100 U. S. 46.
Baltimore v. *Grant*, 98 U. S. 403.
National Bank v. *Matthews*, 98 U. S. 627.

"If this had been the intention, surely it would have been clearly expressed."

Harrington v. *Herrick*, 64 Fed. 471.

"If such had been the intention of Congress no reason suggests itself why Congress should not have unequivocally said so."

Austin v. *United States*, 155 U. S. 417.
Ryan v. *Carter*, 93 U. S. 83.
Tomkins v. *Little Rock Co.*, 125 U. S. 127.
U. S. v. *Ryder*, 110 U. S. 739.
Leavenworth Ry. Co. v. *U. S.*, 92 U. S. 744.
Cherokee Tobacco Co., ... 11 Wall. 620.
Jones v. *Milwaukee*, 16 Wall. 161.
U. S. v. *Anderson*, 9 Wall. 66.
Lawrence v. *Allen*, 7 How. 796.

"Legislative intention must be expressed with irresistible clearness if a court of justice is to suppose a design to overthrow fundamental rights or to depart from the general system of the laws."

United States v. *Fisher*, 2 Cranch. 358.

"Whatever the power of the Legislature may be, its acts ought never to be so construed as to subvert the rights of property unless its intention to do so shall be expressed in such terms as to admit of no doubt and to show a clear design to effect that object."

United States v. *De La Maza Arredondo*, 6 Peters, 691.

"Legislative acts in derogation of the common law are to be strictly construed."

Brown v. *Barry*, 3 Dall. 365.
Northern Pacific R. R. Co. v. *Whalen*, 149 U. S. 157.

"Right of acquiring, procuring and protecting property is natural and inalienable."

Van Horn v. *Dorrance*, 2 Dall. 304.

"In construing a statute reasonably susceptible of two constructions by one of which grave constitutional questions arise and by the other of which such questions are avoided, it is the court's duty to adopt the latter."

U. S. v. *Delaware & Hudson Co.*, 213 U. S. 366.

We are aware that counsel will claim that the correctness of their contention is so clearly expressed as to render inapplicable the rules and principles of construction relied on by us. To this claim it will be a sufficient answer to call attention to the fact that at least one senator did question the correctness of appellant's construction of the amendment. We do not know how many senators or members of the house may have voted for the bill without understanding that it was of the radical character now claimed.

Debates in Congress.

Counsel quote from the remarks made by certain senators while the amendment was under consideration.

These quotations show that at least one of the senators was of the opinion that the words, "who shall be considered and held to be common carriers within the meaning and purpose of this act," were a limitation upon the generality of the preceding portion of the same sentence. We do not know what may have been the understanding of the senators who remained silent or of the members of the House, or of the President whose signature was also necessary.

> "The judgment of the court cannot *in any degree* be influenced by the construction placed upon it by individual members of Congress in the debate which took place in its passage, nor by the motive or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of a majority of both houses and the only mode in which that will is spoken is in the act itself." (By Taney).
>
> *Aldridge* v. *Williams*, 3 How. 23.
>
> See also *Mitchell* v. *Great Works Milling Co.*, 2 Story, 633. (By Story).
>
> "Those who did not speak may not have agreed with those who did, and those who spoke may have differed with each other."
>
> *Soon Hing* v. *Crowley*, 113 U. S. 710.

Thus far we have considered the amendment as made in 1906. But the amendment in its final form was made in 1910. In its final form, wire and wireless telegraph and the telephone were put upon precisely the same footing as were pipe lines by the amendment of 1906. Un-

doubtedly, the "who shall be considered" clause in the act of 1910 has precisely the effect as it had in the act of 1906, though not necessarily, so we now consider the effect of that expression in the act of 1910. At that time there were cases without number throughout the country where there were both wire and wireless telegraph and telephone systems extending and operating across state lines, which were used exclusively by their respective owners. The Armour Packing Company at Kansas City is located on both sides of the state line. So also is the Stock Yards Company. So also the Metropolitan Street Railway System. All these have their own private telephone connections crossing the state line. The Stock Yards Company has its own wire to Chicago. This Company also has its own railroad extending across the state line. The Prairie Oil and Gas Company has its own telegraph system extending from Oklahoma to Indiana. So also has every railway company in the land. The court judicially knows and no doubt every senator and congressman knew like conditions were found everywhere throughout the country. The expression, "who shall be considered, etc.," in the act of 1910, does not have one meaning when applied to pipe lines and a different meaning when applied to wire and wireless telegraph and telephone systems.

Whatever light the debates in Congress may throw upon the question as to the intent of the amendment of 1906, they have no bearing whatever as to the intent of the Congress which adopted the amendment of 1910. If the amendment of 1910 had expressly stated that every company which used a telephone or a wire or wireless telegraph system in its own business, which extended across

a state line, should be considered a common carrier and as such be compelled to file a schedule of rates and charges, can it be supposed such bill could have passed? The idea is not to be seriously entertained. And why? Because such could by no possibility have been the intent. The Congress that made that amendment understood that it was only in the event that a telephone or a wire or wireless system of telegraphy was operated or used by the general public that they would "be held and considered common carriers."

Engaged in Transportation.

We elsewhere speak of the various establishments which in the transaction of their business makes use of wire and wireless telegraph and telephone systems. We also speak of use by the Kansas City Stock Yards Company of its line of railroad connecting parts of its plant located on different sides of the state line, all of which are used exclusively by the companies in their own business. To say that these companies were engaged in telegraphy would not accord with the natural meaning of the language used. And because the Stock Yards Company has its railroad connecting different parts of its plant, it does not follow that it is engaged in the transportation of live stock. True, the word "transport" appears in the charter of The Prairie Oil and Gas Company, but as we elsewhere show the insertion of that word was not necessary to enable it to do all that it can do lawfully, nor did it authorize it to become or act as a common carrier.

The language "engaged in the transportation of oil,"

as contained in the act means so engaged as a business and for hire.

The Kansas Statute.

Appellant's counsel refer to Chapter 315, Laws of Kansas, 1905, for the purpose of showing that The Prairie Oil and Gas Company is in fact a common carrier and therefore affected with a public interest. If an attempt had been made by Kansas to enforce that law, and the law had been sustained by the Supreme Court of the State, and the defendant had appealed to this court, a very different question would be presented. But as a matter of fact, the invalidity of that act has been universally conceded in Kansas. It has been a dead letter since the date of its enactment. A statute ignored and repudiated by the state which enacted it, can hardly be the basis of Federal action.

This act does not make The Prairie Oil and Gas Company a common carrier. In the first place, the act by its express terms is limited to transportation wholly within the state, while the amendment in question applies exclusively to shipments which extend beyond the state. If the act had applied to shipments extending beyond the state it would have been invalid. By the act to which the Hepburn Act is amendatory, Congress had assumed jurisdiction over interstate commerce and this assumption excluded the authority of the state. The act abounds in provisions wholly inconsistent with the regulations of the Interstate Commerce Act, and we cannot comply with the order now sought to be suspended and at the same time obey this state law. Almost every provision in the

act is an utter nullity and the invalid provisions are so related to other provisions that all must fall together. The act declared all pipe lines to be common carriers because the legislature recognized the fact that unless they were common carriers it would have no power to provide for the regulations found in the succeeding sections.

"The federal power over commerce is exclusive whenever the subjects of it are national in character, or admit only of one uniform system or plant of regulation, and where the power is exclusive, non action by Congress is an expression of its will that the subject of it shall remain free from legislative interference.

7 Cyc. 421, citing 181 U. S., and many other cases.

For a stronger reason this rule would apply to a case where, as shown by the original act of 1887, Congress *had* taken more comprehensive action. Congress having occupied the field generally, the state law was a nullity.

Southern Ry. Co. v. *Reed*, 222 U. S. 424; 222 U. S. 444.

Mondou v. *New York, N. H. & H. R. Co.*, 223 U. S., 1-53.

III.

The act is a most glaring instance of class legislation. The lawmakers looked over the field and saw people generaly engaged in their own private business of their own selection. It proceeds to select or create a particular class which shall be required to go into a business selected by

the state. It selects those engaged in the transportation of oil by means of pipe lines. The extent to which those engaged in such business or the incapacity or inability of others generally to do the same service for themselves or the fact that those selected as belonging to the class may or may not have a monopoly of that kind of transportation does not constitute the basis of the classification. The mere fact that the pipe line is used puts the owner in the class. Such classification is arbitrary and is in conflict with the Fourteenth Amendment to the Federal Constitution.

As stated by the court in *State* v. *Haun*, 61 Kansas, 154:

> "In the language of Judge Brewer, 'in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground, some difference which has a just and proper relation to the attempted classification.' "

The court then proceeds approvingly with a quotation from Judge Cooley, which is strictly applicable here.

> "If the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that act would transcend the due bounds of legislative power, even though no express constitutional provisions could be pointed out with which it would come in conflict."

In the Kansas case in which these quotations were made, the court had under consideration a law which made it unlawful for any person, corporation or company to make payment to any employee other than by lawful money of the United States. The court, in its opinion, quoted the remarks of the court in a similar case, *Godcharles* v. *Wigeman*, 6 Atl. 354, as follows:

> "They are utterly unconstitutional and void inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. He may sell his labor for what he thinks best whether money or goods, just as his employer may sell his iron or coal, and any law that proposes to prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void."

In the Kansas case, 61 Kan. p. 164, the court held:

> "That the act is in violation of the fourteenth amendment to the Constitution of the United States, in that it denies to persons within the state the equal protection of the laws."

In the *Coffeyville Vitrified Brick Company* v. *T. P. Perry*, 69 Kan. 297, the court had under consideration a law which made it unlawful to discharge an employee because he belongs to a lawful labor organization. The court held that:

> "The right to terminate a contract is within the protection of the state and federal constitutions,

which guarantee to every citizen the protection of life, liberty and property."

It will be noticed that in that case it was claimed that the law in question was in violation of Section 1 of the Bill of Rights, contained in the state constitution, which provides that:

"All men are possessed of inalienable natural rights, among which are life, liberty and the pursuit of happiness."

The court say:

"The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from an unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right therefore to contract cannot be infringed by the legislature without violating the letter and spirit of the constitution. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer but his associates."

The court cite approvingly Judge Cooley as follows:

"It is a part of every man's natural rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

The Kansas court proceeds as follows:

"The business conducted by the defendant was its property, and in the exercise of this ownership it is protected by the constitution. It had the right beyond the possibility of legislative interference to make any contract with reference thereto not in violation of law."

It thus clearly appears that a law which undertakes to compel the petitioner, which is engaged in a strictly private business to perform service for the general public is in violation of the state constitution. The decision of the Kansas Supreme Court upon that question is conclusive.

Section 1, Article 12 of the Constitution of the State of Kansas is as follows:

> "The legislature shall pass no special conferring corporate powers. Corporations may be created under general laws, but all such laws may be amended or repealed."

And said Chapter 315, laws of Kansas, 1905, reads as follows:

An act relating to the transportation of oil by means of pipe lines.

Be is enacted by the Legislature of the State of Kansas:

Section 1. All pipe-lines laid, built or maintained for the conveyance of crude oil within the State of Kansas are hereby declared to be common carriers, and said conveyance of said oil shall be in the manner and under the restrictions in this act provided.

Sec. 2. It shall be the duty of every person, firm, association or corporation operating such pipe-line to provide suitable and necessary receptacles for receiving such oil for transportation and for storage at the place of delivery until the same can be reasonably removed by the consignee, and shall be liable therefor from the time the same is delivered for transportation until a reason-

able time after the same has been transported to the place of consignment and ready for delivery to the consignee. It shall be the duty of every such person, firm association or corporation to receive and forward such oil as shall be offered for shipment in the order of application therefor, upon the applicant's complying with the rules herein provided for as to the delivery and payment for such transportation. Such common carrier shall issue to the shipper a certificate showing the actual quantity and specific gravity thereof; but no application for such transportation shall be valid beyond or for a greater quantity than the applicant has ready for delivery at the time of making such application.

Sec. 3. It shall be unlawful for any such person, firm association or corporation to charge for the transportation of such crude oil through its line in excess of the following rates for each barrel of forty-two gallons transported: Six miles and less, five cents; over six miles and not more than fifteen miles, six cents; over fifteen miles and not more than forty miles, seven cents; over forty miles and not more than eighty miles, eight cents; over eighty miles and not more than one hundred miles, ten cents; over one hundred miles and not more than one hundred fifty miles, fifteen cents; over one hundred fifty miles and not more than two hundred miles, twenty cents; over two hundred miles and not more than two hundred fifty miles, twenty-three cents; over two hundred and fifty miles and not more than three hundred miles, twenty-five cents.

Sec. 4. The State Board of Railroad Commissioners shall have the general supervision and control over all

such persons, firms, associations or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct thereof, which rules, when prescribed, and delivered in writing to any such person, firm, association or corporation, shall be printed and posted up in a convenient, accessible place at each office, station or place of business where such oil is received or delivered. The State Board of Railroad Commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in section 3 hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, association, or corporation after its publication in the official state paper; provided, the reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this state, and such court, shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the Supreme Court as other civil proceedings, regardless of sum or value involved; provided, before beginning such proceedings in court to test such matters such person, firm, association or corporation shall execute a bond to the State of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association or corporation making such application will promptly pay to any shipper the difference between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the State Board of Railroad Commissioners, the rates prescribed in Section 3 of this act shall cease to be in force.

and the rates so fixed by the State Board of Railroad Commissioners shall govern, as in this section provided.

Sec. 5. Any such person, firm, association or corporation which shall fail or refuse to accept, transport and deliver oil when offered up to the full capacity of such pipe-line, at rates not to exceed those provided for by this act, or shall fail, neglect or refuse to obey any rule so established by the State Board of Railroad Commissioners, shall be liable to the person injured by such failure or refusal in the sum of five hundred dollars liquidated damages, together with reasonable attorney's fees, to be fixed by the court, in case suit shall be brought therefor; such liquidated damages and attorney's fees to be recovered in any court of competent jurisdiction; and in case of any corporation so refusing or failing, the Charter Board is hereby authorized to revoke the charter or permit to do business in this state for such corporation.

Sec. 6. This act shall take effect and be in force from and after its publication in the official state paper.

Approved February 22, 1905.

Published in official State paper, February 28, 1905.

In approaching the question as to the validity of this act, we desire to submit as worthy of some consideration, that this act was passed and became effective on the 28th day of February, 1905. At that time The Prairie Oil and Gas Company was operating its line from the south line of the State of Kansas to a point near Kansas City in the State of Missouri, Sugar Creek, and had begun the construction of its lines from a point in Missouri, near Kansas City, to Griffith, Indiana. Although

the act has been on the statute books of Kansas more than seven years, and although a number of pipe lines have since been built in the State of Kansas, lawyers of the state generally regard the act as unconstitutional and no effort has been made on behalf of the state or any private individual to subject any of the pipe lines operating in the state to the provisions of this act.

Recognizing charters of authority to engage in business as a private corporation in the light of contracts between the stockholders of the corporation and the state, as we believe the law generally recognized such charters, the framers of the constitution provided that corporations should be created under general laws, and reserved to the state the power to amend or repeal such laws. It was also provided by the same section that the legislature should pass no special act conferring corporate powers. If the legislature can pass no special act conferring corporate powers, and all corporations must be created under general laws, then in order to exercise the reserved powers retained by the state to amend or repeal, the same must be done by an amendment or repealing act.

The Prairie Oil and Gas Company was incorporated in 1900 as The Kansas Oil and Gas Company, and later its name was changed in accordance with the general laws of the State of Kansas to The Prairia Oil and Gas Company. The incorporation was effected under the Constitution and general laws of the State of Kansas, which constituted the contract between the company and the state, and between the company and its stockholders under the authority of the state.

It lawfully acquired oil producing properties and a

pipe-line for convenience and economical conduct of its business. It had vested rights in its property and the exclusive use and enjoyment of the same. Did the act of the legislature, becoming effective February 28, 1905, deprive it of those rights, and not only confer upon it additional authority outside of its charter, but compel it to engage in the tranportation of oil as a public business and for hire? Did that act of the Kansas legislature amend the law under which The Prairie Oil and Gas Company was organized or repeal the law under which it claimed authority to exist? We think not. In the first place, if it is an amendment of the corporation laws of the state, or any of them, or any section of such laws, it must be made in the manner prescribed by the Constitution of the State of Kansas. Section 16 of Article 2 of that Constitution reads as follows:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

The Supreme Court of the State of Kansas has decided that this section is mandatory.

> *Co. Com.* v. *Bailey*, 13 Kan. 600.
> *Philpin* v. *McCarty*, 24 Kan. 393.
> *State* v. *Llewelling*, 51 Kan. 562.
> *State* v. *Scholl*, 58 Kan. 507.

The title to the act is, "An Act relating to the transportation of oil by means of pipe-lines," which would clearly indicate that the act itself was an original

law relating to a single subject, the transportation of oil by means of pipe lines. It is not an amendment to any existing law for no such law sought to be amended is anywhere referred to in the act. It does not repeal any act or section of any act. Therefore, under the provisions of the constitution of the state, above recited, it does not affect the charter or authority to do business of The Prairie Oil and Gas Company, incorporated under the general laws of the state, as above shown.

Section 1 of the act declares pipe lines to be common carriers, without regard to the manner of their construction, when they were constructed or how they were used in the conveyance of oil. Section 1 undertakes to impose an entirely new burden upon the owner of a certain class of property; in fact, it undertakes to impose upon private property all obligations incident to the service of the public as a common carrier.

Section 2 requires the owner of pipe lines for the conveyance of crude oil to provide suitable and necessary receptacles, without limit, for the storage of oil at the place of delivery, until the same can be reasonably removed by the consignee. It imposes upon the owner of pipe lines unlimited liability to the owner of the oil, not only during transportation but "until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee." It requires the owner of pipe lines to forward such oil as shall be offered for shipment in the order of the application therefor, without limit as to quantity or condition.

Section 3 provides maximum rates for the trans-

portation of crude oil within the State of Kansas by common carriers.

Section 4 enlarges and extends the jurisdiction of the State Board of Railroad Commissioners to and over private property.

Section 5 provides a penalty for refusal to accept oil for transportation when offered, up to the full capacity of such pipe line and for its neglect or refusal to obey any order or rule established by the State Board of Railroad Commissioners and for the revocation of the charter of any corporation so refusing or failing.

Thus it will be seen that this single act includes attempted legislation on five separate and distinct subjects, namely; the appropriation of private property for public use; fixing the liability of a carrier to the consignor and consignee and requiring the construction of storage facilities; the fixing of maximum rates for the transportation of oil; defining the powers and authority of the Board of Railroad Commissioners; prescribing penalties, and for forfeiture of corporate charters, none of which, except section 3, can be fairly said to be, "clearly expressed in its title."

It will not be contended that the law under which The Prairie Oil and Gas Company was organized has been repealed and that there is no statutory authority for its existence; neither can it be contended that the act in question amends any section of the law because the provisions of the state constitution relative to amendment and repeal have not been complied with. Therefore, the act is not an exercise by the state of a reserved power to amend or repeal the law under which their corpora-

tion was organized. We must bear in mind that the power reserved to the State of Kansas is not to amend the charter of all corporations or any particular corporation, but the reserve power is only to amend the law, the general law under which corporations are created.

Incorporators and stockholders in incorporated companies have a right and opportunity to determine for themselves whether or not to embark upon or to continue to engage in any particular business under the terms of such a law.

But the power reserved in the State of Kansas to amend or repeal the general laws under which corporation may be created is not unlimited. Private property cannot be taken for public uses without compensation. The vested rights in property of corporations cannot be invaded and destroyed under the pretense of exercising the reserved power to amend general laws under which corporations are permitted to organize and exist.

In *Shields* v. *State of Ohio*, 95 U. S. 324 (24 Law Ed. 357), Mr. Justice Swayne, in delivering the opinion for the court, upon consideration of the same provision in the Constitution of the State of Ohio as contained in the Constitution of the State of Kansas, says:

> "The power of alteration and amendment is not without limit. The alteration must be reasonable; they must be made in good faith, and be consistent with the scope and object of the Act of Incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions

and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In *Miller* v. *R. R. Co.*, 21 Barb. 513, the Legislature, under the reserved power of alteration, required the company, which had been previously incorporated, to construct a highway across their road. The work was expensive and of no benefit to the company. The act imposing the burden was held to be void.

In *Worcester* v. *R. R. Co.*, 109 Mass. 103, the Legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the City of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union station, and after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the Legislature to amend, alter, or repeal the charters of those companies."

The Supreme Court of Ohio in *State ex rel., Emerson E. White et al.* v. *William Howard Neff et al.*, 52 Ohio State ....., 28 L. R. A. 409, adopts, cites and quotes *Shields* v. *Ohio*, 95 U. S. 324, as a declaration of some of the limitations upon the power reserved by the state under such constitutions as that of Kansas.

Also, in the *City of Detroit* v. *Detroit & Howell Plank-Road Company*, 5th N. W. 275, where it was sought by an act of the Legislature to deprive the Detroit & Howell Plank-Road Company of the use of two and one-half miles of road it had lawfully acquired within

the City of Detroit and deprive it of the right to collect tolls, thereon, the court say:

> "It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the 'law of the land.'"

And again, the court further say:

> "What the state claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may do it in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also; or from any township on the line, and a single section of statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation. It may be that what the legislature of 1879 proposed to accomplish would, in itself, work no hardship to the respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property, and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences."

The Supreme Court of the United States in the

Sinking Fund cases, 99 U. S. 700 (25 Law Ed., 496), in the opinion by Mr. Chief Justice Waite, speaking of this power reserved to the State, say:

> "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession by contracts lawfully made;"

and, citing several cases, dismisses the subject with the following language:

> "Mr. Justice Swayne, in *Shields* v. *Ohio*, 95 U. S. 324, says, by way of limitation, 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the Act of Incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.' The rules as here laid down are fully sustained by authority. Further citations are unnecessary."

In *The Maine Central Railroad Company* v. *State of Maine*, 96 U. S. 499 (24 Law Ed. 836), Mr. Justice Field, in the opinion of the court, says:

> "It is not questioned by counsel on either side that the charter of a private corporation is a contract between the State and its corporators, and protected under the Constitution of the United States, like any other contract, from legislation impairing its obligation. This has been so often decided, that its statement is only the repetition of an admitted legal principle."

Wade v. *Lutcher & Moore Cypress Lumber Company, Limited*, 20 C. C. A. 515, is instructive and in point in the determination of this question, since the constitution of the State of Louisiana prohibits the creation of corporations by special or local laws, and also contains a provision declaring railroad companies to be common carriers. The action was a suit for damages, growing out of a wreck of the defendant's railroad, which resulted in the death of plaintiff's son. The court said:

> "The learned counsel for the plaintiff in error contends that by article 46 of the Constitution of Louisiana the creation of corporations by special or local laws is prohibited, and that by article 244 of the same constitution all railroads, public highways, and railroad companies are declared common carriers, so that 'When the Lutcher & Moore Cypress Lumber Company, Limited, was incorporated for the purpose, *inter alia*, of constructing and operating a railroad, and it did construct a railroad, its road thereby became a public highway, and it became a common carrier.' The Lutcher & Moore Cypress Lumber Company, Limited, was created a corporation under a general act of the State of Louisiana providing for the creation of corporations to carry on lawful business or enterprises not otherwise provided for by, and not inconsistent with, the laws of the state. The law provides that any number of persons, not less than three, upon complying with the provisions of the laws of the state governing corporations in general, may form themselves into and constitute a corporation for such business purposes, and that to the name of every corporation created shall be attached the word 'Limited,' which word is to appear in all its

signs, correspondence, and business papers, etc.; in other words, providing for the incorporation of limited partnerships. Stockjobbing alone was prohibited. The general laws of the state then in force authorized the organization of corporations for works of public improvements and public utility, and by them it was provided that any number of persons, not less than six, on complying with certain provisions, might form themselves into and constitute a corporation for the purpose of construction, working and maintenance of railroads, canals, plank roads, bridges, ferries, and other works of public improvement, whether within or without the limits of the state, and for other purposes not necessary to name. But for the earnestness with which the argument was presented to this court, we would not suppose that learned counsel would seriously contend that article 244 of the state constitution, dealing with corporations of public improvement and public utility, was intended to, or could be so construed as to make out of a logging railroad appurtenant to a sawmill constructed wholly on private grounds, and operated for private purpose, a common carrier charged with all the duties and responsibilities incumbent by the law of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared to be a common carrier. The Supreme Court of the State of Louisiana, while not squarely deciding the matter in hand, has decided that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from

one another, and which, it was charged, was not a corporation organized for public purposes, but was a combination of individuals, whose sole object was to foster the private ends of two certain persons named who owned jointly two sugar plantations, and who wished to transport the sugar cane grown on one of the plantations to the refinery, situated on the other, was not, *ex necessitate*, such a corporation for public improvement as would authorize the expropriation of private property for its purposes (*Williams* v. *Judge of Eighteenth Judicial Dist. Court*, 45 La. Ann. 1295; 14 South 57). The proposition that an individual or corporation may build a railroad wholly on his own land, for his own business, without making the same a common carrier, we do not doubt. We think it equally clear that there is a decided line of demarcation as to responsibility between common carriers carrying for hire and the obligations and duties devolving upon a private carrier carrying occasional passengers gratuitously."

In *Zabriskie* v. *Hackensack and New York Railroad Company*, 90 American Decisions 617, we find the following syllabi:

"Corporate charter granted by legislature is a contract between the state and the corporators, and the former cannot take away or impair any of the franchises or privileges granted. In other respects the corporation is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons.

"Legislatures may confer new privileges upon corporations, to be accepted at its election.

"Where parties associate themselves as partners,

or as a corporation, for a business and time specified in their agreement or charter, the objects and business of the partnership or corporation cannot be changed, abandoned, or sold out within the time specified without the consent of all the partners or corporators; one partner or corporator can prevent it, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

"Reservation of power in statute creating corporations, that its charter may be altered, suspended, or repealed in the discretion of the legislature, is a reservation to the state for the benefit of the public, to be exercised by the state only, and does not extend to giving a power to one part of the corporators against the others which they did not have before; nor can the legislature in the exercise of the power reserved authorize a bare majority of the corporators to change the object of the corporation in any manner.

"Reserved power of legislature to repeal or suspend, alter or modify, a charter is confined to an alteration of something contained in the franchises granted; the legislature has no power to make any substantial additions to the work. It cannot impose a new charter and oblige the stockholders to accept it, nor can it substitute a thing entirely different from that granted.

"Supplemental franchises granted corporation, authorizing it to construct additional work from that authorized by the original charter, but not compelling it to do so, is not an alteration or change of the original charter; it remains the same, and no new burdens are imposed except so far as the corpora-

tion assumes them. But the corporation is restrained from expending the money or using the credit of the shareholders in the additional enterprise unless every one of them consents."

And in the opinion, the court says:

"There is no other alternative to the proposition that while the power reserved authorizes the legislature within certain limits to make such alterations as they choose to impose, it gives no authority when the legislature does not impose them for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature.

"Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind wholly or chiefly new substituted for another is not an alteration; it is a change.

"In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

"Again, the power is to alter or modify the act, and the true construction of this I hold to be an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fares, or the amount to be taken. But the legislature had no right to impose upon the company any other duty, or anything devolving any other duty, than that attending the building of a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific.

"By a wider construction of this power, any of the main lines of railroad running through the state, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route that the legislature may direct. It must be held that the power to alter and modify does not give the power to make any substantial additions to the work."

That the act of the Kansas legislature attempts to appropriate private property to a public use cannot be questioned. Section 5 provides that, "any such person, firm, association or corporation, which shall fail or refuse to acept, transport and deliver oil when offered up to the full capacity of such pipe line, * * * or shall fail, neglect or refuse to obey any rule so established by the State Board of Railroad Commissioners," shall be liable

to a penalty of $500.00 together with reasonable attorney's fees, and if a corporation, its charter shall be subject to revocation.

The act is unconstitutional because it attempts to create corporate powers and duties by special act of the legislature in addition to the corporate powers and duties imposed under the general corporation laws of the state. It imposes a special and unreasonable burden upon the owners of certain classes of property by reason of the ownership and for no other reason.

It is unconstitutional because it violates the Fourteenth Amendment to the Constitution of the United States, which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And the Fifth Amendment to the Constitution of the United States, in that it takes private property for public use without just compensation.

The constitution and laws of the State of Kansas guarantee to the citizens, including corporations, the right to acquire, possess and freely use private property for all lawful purposes and uses, and to deny the owner of a pipe line of such common right, is to deny him the equal protection of the law.

It is unconstitutional because violative of Section 1, Article 12, of the Constitution of the State of Kansas, above cited.

We therefore conclude that the Kansas statute has no bearing upon the questions involved.

Affected With a Public Interest.

In every case relied upon by counsel for appellant, by the voluntary act of the party whose business was to be regulated, the public had been permitted to become a participant, and the regulation was restricted to the particular part of the business in which the public was a participant. The warehouseman was warehousing for the public. The water company, the telephone company, and the Associated Press, in the 91st Illinois, cited by the assistant solicitor, were all serving the public and the regulation did not merely affect incidentally, collaterally and ultimately such service, but it had to do with and was restricted to, and its effect was immediate, upon the very service in which the public was a participant. It was a regulation of what was actually taking place when the public and the other party were having their deal. In the instance at bar, however, the correcting and regulating hand of the government is not applied until the deal between the public and the other party has terminated.

Case of *Cargill Co.* v. *Minnesota*, 180 U. S. 452.

Counsel seem to rely specially on this case. Here a warehouse was used exclusively for the storage of the owner's own grain. But it was not held that he could be compelled to perform a like service for others. That case arose under a state law. Interstate commerce was not involved and whatever the state might have done, Congress could not have enacted that law. In that case the warehouseman had so conducted his business that in

the opinion of the Supreme Court of the state his warehouse had become something more than a warehouse. It had become a public market. That being the case, of course, that part of the business in which the public participated was affected with a public interest. The only question involved was whether or not one who had such a market could be required to take out a state license. It is very apparent from a reading of the opinion of the state and the United States Supreme Court in that case that it would not have been held in that case that the warehousing part of the business had become affected with a public interest or that the owner could be required to store grain for the public.

And so here. If the state should be of the opinion that the purchase of oil at the termini of the various gathering lines rendered such localities a public market and had required the company to take out license and had made provisions to insure fair dealing between the company and oil producers, such a law would no doubt be upheld on the authority of the Cargill Company case. That case, however, does not go farther, and it constitutes no authority for holding the Company's pipe-line facilities to be affected with a public interest.

In this connection we call attention to the Oklahoma statute, Article 11, Chapter 75, Compiled Laws of 1909. This act addresses itself to the pipe-line owner who was also a purchaser, in his capacity as purchaser rather than transporter. In other words, it dealt with him in the capacity in which he came in contact with the seller. It provided (Section 4822) that every transporter of oil by means of pipe-line should also "be a common pur-

chaser thereof, and shall purchase all of the petroleum in the vicinity of, or which may reasonably be reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another and shall fully perform all the duties of a common purchaser. But if it shall be unable to perform the same, or be legally excusable from purchasing and transporting all of the oil produced, then it shall purchase and transport petroleum from each person ratably in proportion to the average daily production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of oil, or facilities as between producers or persons, and in the event that it is likewise a producer, it is hereby prohibited from discriminating in favor of its own production or storage in which it may be interested directly or indirectly, in whole or in part, and its own production and storage shall be treated as that of any other person or producer."

> "All persons, firms, associations and corporations are excepted from the provisions of this act where the nature and extent of their business is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence, and for this purpose the district courts of the state and the corporation commission are hereby vested with jurisdiction to determine such exemptions in any action or proceeding properly before them as provided in this act."

This act seems to have been framed in recognition of the principles laid down in the Cargill Co. case. The

remedy was applied at the precise point where the alleged evil manifested itself.

Not a Transportation Company.

Appellant counsel speak of The Prairie Oil and Gas Company as being a transporter. This is incorrect. Under its charter it cannot become a common carrier. True its charter says the purposes for which it is formed are to "explore for, mine, produce, purchase, sell, store, refine, *transport* and manufacture petroleum oil." The use of the word "transport" was not necessary to enable it to transport its own product to market. The power to sell includes the power to take to the purchaser and whatever power it has to transport is based exclusively upon and as incidental to its power to sell. Under its charter it is not nor can it be "engaged in transportation." That it is not given the power to become a carrier for others clearly appears by reference to the law under which it was organized, Chapter 23, General Statutes, 1909.

The purposes for which corporations may be formed under this chapter are designated and specifically enumerated in Section 1699. Every provision of this section, defining the purposes for which corporations may be organized, is confined to a single subject until we reach subdivision 46. In this subdivision several distinct classes of business are enumerated which may be incorporated separately or combined. It is under this subdivision that The Prairie Oil and Gas Company was organized. Transportation was not one of the kinds of business enumerated.

Again, Section 1701 provides that the corporate name of every corporation hereafter organized, except banks and corporations not organized for profit, shall commence with the word "The" and end with the word "corporation, company or society," and shall designate by its corporate name the character of the business to be carried on by the corporation. The name, "The Prairie Oil and Gas Company" certainly does not indicate that the company is to engage in transportation as a common carrier of petroleum or any other commodity.

This subdivision 46 has been judicially construed in *Porkinson Sugar Co.* v. *Bank of Fort Scott*, 60th Kansas, 474. From the opinion in this case, it clearly appears that a corporation may conduct such lines of business as are mentioned in some one of these forty-eight subdivisions, and it may conduct all the businesses mentioned in any one subdivision, and the only instance where two distinct kinds of business can be conducted by one corporation is in the case provided for in subdivision 46, under which this company is organized. The mention of the one is the exclusion of all the others. Says the court in speaking of subdivision 46, this being the subdivision under which the Prairie Oil and Gas. Co. was organized. "Our law is exceedingly liberal in allowing a combination of the lines of business which may be carried on by a single corporation. It authorizes 'the transaction of any mining, mechanical, chemical, or mercantile and agricultural produce business, either separately or all combined." If the company wished to engage in the transportation business, it could have done so under another subdivision. Sec. 1699, "The purposes for

which private corporations may be formed are * * * (32). The transportation of goods, wares, merchandise, or any valuable thing." Under such a statute the company which engages in business as a common carrier must confine itself to that particular business and its corporate name must indicate that business.

Because of the absence of the word "transportation" in its name, as well as the other statutory provisions above quoted, the company could not become a common carrier or be engaged in transportation. If it should do so, whether it did so voluntarily or under duress of the order now sought to be enjoined, its charter would be subject to revocation by the state. It is not in the power of the Federal government to compel a corporation to do what the law of its creator forbids. We do not claim that one can have a vested right to continue a course of action which tends to create a monopoly, or that a state law may stand in the way of the Federal government in a case coming within its jurisdiction when it seeks to prevent monopoly, but we do claim that Federal authority cannot compel affirmative action in violation of a state law as a means of the prevention of monopoly. The utmost that it can do is to forbid. But the amendment in question and the order sought to be enjoined requires affirmative action which would be in violation of the law of the state and which might result in the compulsory abandonment of all its property within the state.

Said sections 1699 and 1701 are as follows:

> Section 1699, General Statutes of Kansas, 1909, declares the purposes for which corporations

may be formed in the State of Kansas, and reads as follows:

Purposes for which corporations may be formed.

The purposes for which private corporations may be formed are: (1) The support of public worship. (2) The support of any benevolent, charitable, educational or missionary undertaking. (3) The support of any literary or scientific undertaking, the maintenance of a library, or the promoting of painting, music, or other fine arts. (4) The encouragement of agriculture and horticulture. (5) The maintenance of public parks and of facilities for skating and other innocent sports. (6) The maintenance of a club for social enjoyment. (7) The maintenance of a public or private cemetery. (8) The prevention or punishment of theft or willful injuries to property, and insurance against such risks. (9) The insurance of human life and dealing in annuities. (10) The insurance of human beings against sickness or personal injury. (11) The insurance of lives of domestic animals or against their loss by other means. (12) The insurance of property—marine risks. (13) The insurance of property against loss or injury by fire or by any risk of inland transportation. (14) The purchase, location, and laying out of town sites and the sale and conveyance of the same in lots and subdivisions and otherwise. (15) The construction and maintenance of a railway and of a telegraph line in connection therewith. (16) The construction and maintenance of any species of road and of bridges in connection therewith. (17) The construction and maintenance of a bridge. (18) The construction and maintenance of a tele-

graph line. (19) The establishment and maintenance of a line of stages. (20) The establishment and maintenance of a ferry. (21) The building and navigation of steamboats and carriage of persons and property thereon. (22) The construction and maintenance of a telephone line. (23) The supply of water to the public. (24) The manufacture and supply of gas or the supply of light or heat to the public by other means. (25) The production and supply of light, heat or power by electricity. (26) The transaction of any manufacturing, mining, mechanical or chemical business. (27) The transaction of a printing and publishing business. (28) The establishment and maintenance of a hotel. (29) The establishment and maintenance of a theatre or opera-house. (30) The purchase, erection and maintenance of buildings, including the real estate upon which same are or may be situated when erected. (31) The improvement of the breed of domestic animals by importation, sale or otherwise. (32) The transportation of goods, wares, merchandise or any valuable thing. (33) The promotion of immigration. (34) The construction and maintenance of sewers. (35) The construction and maintenance of a street railway. (36) The erection and maintenance of market-houses and market-places. (37) The construction and maintenance of dams and canals for the purpose of water-works, irrigation, or manufacturing purposes. (38) The construction, maintenance and operation of union stock-yards, and the erection of such buildings, hotels, railways and switches as may be necessary for that purpose. (39) The conversion and disposal of agricultural products by means of mills, elevators, markets, and stores, or otherwise. (40) The or-

ganization and maintenance of boards of trade and business exchanges, with powers to hold and improve real estate and to transact any and all business connected therewith. (41) The organization of loan and trust companies: Provided, That nothing in this act shall be constructed to authorize such loan and trust companies to sell real estate held as security, except in the manner provided by law. (42) The organization and control of building and loan associations. (43) The organization and control of banks. (44) The organization and control of saving banks. (45) To raise necessary funds by any settlers on any Indian lands in this state to defray expenses in endeavoring to obtain title to any such lands so occupied by settlers. (46) The transaction of any manufacturing, mining, mechanical, chemical or mercantile and agricultural implements and produce business, either separately or combined. (47) The selling, hiring, or leasing engines, cars, rolling-stock and other equipment for railroads to railroad companies. (48) The insurance of crops against damage by hail-stones. (49) The insurance of plate glass.

Section 7. The corporate name of every corporation hereafter organized (except banks and corporations not for pecuniary profit) shall commence with the word "the" and end with the word "corporation," "company," "association," or "society," and shall indicate by its corporate name the character of the business to be carried on by the corporation.

Franchises.

The assistant solicitor speaks of the right which the pipe line company has to go under and along high-

ways as a franchise. As a general rule the public has no title and can acquire no title to the ground occupied by a highway, and such is the law in Illinois, Iowa, Missouri and Kansas. The fee title with the ownership of oil, gas, or other mineral product, together with the right to such use as does not interfere with the highway, remains in the original owner. In the exceptional cases where the fee is in the municipality, if any such there be, the title of the municipality to such use as does not interfere with the highway is held not in a governmental but in its capacity as a private owner, and such right as the pipe line owner has to go under the highway is in no sense a franchise. Where a municipality owns the fee, such fact leaves both the State and Federal government on precisely the same footing with respect to coal or other mineral product, or the right to lay pipe under the street as if the ground were owned by private parties. As to such matters the municipality is a private party.

The Amendment Invalid.

It is claimed the great wealth of the Company enabled it to provide facilities for transportation superior to that of others, and thereby gave it the power to dictate the price at which the individual oil producers must sell, and that in this way it has a monopoly in the purchase of oil. It is further claimed that the prevention of this monopoly was the purpose of this act. This we deny. The prevention of monopoly may be the indirect and collateral effect in some cases, but such was not the primary purpose. The act applies to the pipe line owner, regardless of the fact that he is or is not also a pur-

chaser. He may prefer to cease purchasing entirely. Still he must become a common carrier. He may even wish to cease both the purchase of oil from others and the transportation of his own oil through his pipes, but the law as construed will not permit. Appellant's counsel claim otherwise, but such is not the case. The commission have not so construed the law. The order of which we complain and which has been enjoined does not permit appellee to avoid becoming a common carrier even though it abandon the use of its pipe lines. It was not the purpose of Congress to permit the waste of the capital invested in these pipe lines. Oil can be transported far more cheaply in this way than by rail and this advantage must still be utilized. The Company must not abandon or destroy its property, but it must permit others to share in its use. The commission so construes it.

That the prevention of monopoly was not the primary purposes still further appears. The greater portion of the territory through which the appellee's lines extend is occupied by powerful and active competitors, which also have pipe lines, and one of whom has now a like case before this court, and the price paid to oil producers is determined by the law of competition instead of dictation. And yet this law applies in a vast extent of territory where there is no possibility of monopoly.

A transporter of oil who is not also a purchaser can by no possibility have a monopoly in the purchase of oil. An act intended to prevent a monopoly in the purchase of oil would never be so worded as to include those who never were purchasers of oil or who see fit to dis-

continue the purchase of oil. If it had been, as claimed, the intent to prevent pipe line owners from having a monopoly in the purchase of oil, the amendment would have limited the application of the act to such pipe line owners as were also purchasers. The omission of the words, "who are also purchasers of oil" or some equivalent expression all but conclusively shows that the prevention of a monopoly in the purchase of oil was not the purpose of the act.

Another fact may be noted. We have the Sherman Act, specially designed and prepared for the prevention of monopoly. Then we have the Hepburn Act specially designed and prepared for the regulation of interstate commerce transportation by public agencies. If the purpose of this amendment was the prevention of monopoly, why was it not placed in the Sherman Act?

But conceding for the sake of the argument what we do not concede in fact, that the prevention of monopoly was the intent of the act, still the act is invalid as to The Prairie Oil and Gas Company.

If the prevention of monopoly was the purpose, what monopoly was it? It could not be in the matter of transportation, because the only oil transported by this appellee is that which is its own property. Congress may regulate such transportation, but it cannot under the guise of regulation, adopt a measure which will prevent it from having a complete monopoly in the transportation of its own oil. Nor does the amendment in question, in the slightest degree, interfere with the monopoly which the Company has in the transportation of its own oil. Then what monopoly is it which this

amendment can be said to have been intended to prevent?

The claim is that by reason of the advantages appellee has by reason of its great wealth it has been enabled to provide itself with facilities for the transportation of the oil which it owns, which are superior to such as are possessed by other oil owners, and that this advantage gives it the power to dictate the price at which oil producers must sell the crude product, and thereby secures to itself a monopoly in the purchase of oil. But the transactions between the Company and the producer does not constitute interstate commerce. The deal has been consummated and the alleged monopoly has had its full effect before the oil becomes a subject of interstate commerce. In fact, it is as yet uncertain whether it ever will become so. There are many refineries within the State of Kansas and Oklahoma, which are oil purchasers.

We recognize the power of Congress by virtue of the interstate commerce clause of the constitution to regulate the transportation of oil by its owner, but such regulation is limited to provisions to prevent interference with navigation, injuries from the escape of oil and other like matters, but because it can make some regulations, it does not follow that it can make whatever it sees fit. This act, as construed, instead of applying such limited power of regulation to the business in which the appellee is actually engaged, goes far beyond and compels it to engage in a totally different line of business against its will, and then proceeds to regulate that, and this it does as a means for the prevention of a monopoly which can only be dealt with by the state.

If the direct and immediate purpose had been as claimed, to prevent the pipe line owners from having a monopoly in the purchase of oil, the natural method would have been to say in simple and direct language that "pipe line owners shall not purchase oil" or that "no pipe line owner shall use his pipes for the transportation of oil which he has purchased." That kind of a law would prevent the alleged monopoly, but it would not have given others the benefit of the appellee's facilities for transporting oil. Prevention of monopoly in the purchase of oil would be the direct and immediate effect of such a law. On the other hand, while the ultimate and incidental effect of the act in question might tend to prevent such monopoly, the immediate and without doubt the intended effect would be to give the other oil shippers the use of the superior transportation facilities its ampler means had enabled it to provide. It would seem that Congress, recognizing the fact that it is without power under the constitution to deal with the alleged monopoly by legislation of such character above suggested, had attempted to do so indirectly by means of the amendment in question, but that which Congress cannot do directly it may not do indirectly.

Not within the province of the Federal Government to Legislate with reference to the Alleged Monopoly.

It is claimed that to prevent the monopoly which the pipe line owner has in the purchase of oil was the purpose of the act. The deal between the Company and the oil producer takes place at the *termini* of the Com-

pany's gathering lines. There are many refineries both in Kansas and Oklahoma. A large percentage of the oil produced in these states is sold to these refineries and never passes through any pipe line. Much of the remainder goes into storage and does not become the subject of interstate commerce for months or years.

By a legitimate use of its means the Oil Company has provided itself with facilities for the transportation of its own oil and whatever criticism may be made of the manner by which it became the owner of its oil does not alter the fact that it does become such owner. If there be anything objectionable in the means by which it becomes the owner, it is a matter to be dealt with by proper governmental authority before it becomes the owner of the oil and before it becomes the subject of interstate commerce. The sale whereof it is claimed the pipe line owner has a monopoly, begins and is completed in the state, and the contract of sale has no reference to the transportation beyond the state, which may or may not follow as the purchaser may determine after the sale is completed.

Suppose a manufacturer, by reason of his superior means, or by reason of a patent, is able to overbid in buying the raw material and undersell in disposing of the finished product, and in this way have a monopoly, waiving any question as to the power of the state to do so, could the Federal Government intervene and as a means of preventing such monopoly, enter into and take charge of his establishment and regulate the manner of conducting his business or compel him to use his machinery and patented process in manufacturing for others.

for a compensation to be determined by a governmental commission?

Could such action be upheld by reason of the fact that some or all of the output of the establishment had theretofore become the subject matter of interstate commerce.

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the natural law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in that they commence their final movement for transportation from the state of their origin to that of their destination."
>
> *Coe* v. *Errol*, 116 U. S. 524.

The oil, the monopoly of which it claimed the act was intended to prevent, certainly does not "commence its final movement for transportation" until after it becomes the property of the only person who can determine whether it shall be transported or not.

Right to Compensation Absolute.

Appellee's property will be taken and it has a right to compensation. The amendment does not expressly direct the taking of property, but by necessary implication it so intends. The pipe line owner must become a common carrier. In the brief for the Government it is said the property is not taken out of the hands of the owner. Very true, but what is done is still worse. With the property still in the hands of the owner, it takes posses-

sion both of the property and the owner and the "hands" of the owner are not under the control of the owner's will. No other eminent domain act, to our knowledge, provides for the taking of persons. We have here what in effect is an eminent domain act in which the provision for compensation is omitted. The Company which we represent has a very large amount of oil on hand to supply its trade, the maximum capacity of its line would be required for many months even though its production and purchases should cease. To readjust its system so as to enable it to enter into the service of the various individual owners with their different grades of oil, would require a heavy initial expense. The only compensation suggested is the rates and charges that may be charged. Charges for what? Certainly not for property or for uses of property of which appellee would be deprived, but for services hereafter rendered for others as required by the Interstate Commerce Commission under the act. In other words, the compensation would be for the rendition of "Involuntary service" to the public, although involuntary servitude except for the commission of crime is generally understood to have been abolished in this county by the 13th Amendment.

But suppose there are no rates and charges. Appellant's counsel say appellee is at liberty to cease the use of our pipes (though the order sought to be enjoined does not so permit). But suppose it does. Suppose, as it has a moral, if not a legal right to do, that rather than be forced into a business for which its system is not adapted and which for other reasons may be objectionable, it sees fit to cease using its lines. Here

there would be no rates and charges. It would be deprived of its property without any compensation. If its property is taken, its right to compensation is absolute. It cannot be made to depend upon the condition that it engage in a business which for any reason may be objectionable to it and for which its facilities are inadequate and not adapted. It would be deprived of its property and would receive no compensation. The only way for it to receive the compensation suggested would be to do voluntarily that which its charter does not permit it to do and which it cannot be compelled to do.

Congress not the exclusive judge as to the means for the prevention of monopoly.

It is claimed that congress may select such means as it sees fit to prevent monopoly. This we deny. The mere fact that an act is designated and may tend to prevent monopoly is not sufficient to render the act valid. The remarks of the court in *Mo. Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, 30 S. C. R. 461, with respect to owners of railroads apply equally to owners of pipe lines:

> "But railroads after all are property protected by the constitution and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

The act is invalid even though it be conceded that the act was intended to prevent monopoly.

To require pipe line owners to be common carriers is in excess of legislative power and is in violation of Section 1, Article 1 of the Federal Constitution. Congress

has only such power as is conferred upon it by the constitution. The act as construed by the defendants is beyond the power of Congress.

In *State* v. *Haun*, 61 Kan. 154, the Supreme Court of Kansas quotes with approval the declaration of Judge Cooley that there are limitations upon the power of the legislative body which transcend the due bounds of legislative power "even though no express constitutional provisions could be pointed out with which it would come in conflict." This decision which is extensively quoted and approved in *Cotting* v. *Goddard*, 183 U. S. 79, is especially applicable to Chap. 315, Laws of Kansas, 1905. The Federal act involved stands upon the same footing.

The legislative power conferred upon congress by the federal constitution does not include the power to compel a citizen to employ his capital and personal services in a business against his wish even though to do so, as a non-proximate and collateral effect, might tend to prevent monopoly in some business other than that in which the pipe line owner was theretofore, or might thereby be compelled to become engaged.

In *Chicago, B. & Q. Ry. Co.* v. *City of Chicago*, 166 U. S. 236, the court in speaking of a law "declaring in terms without more than the full and exclusive title to a described piece of land belonging to one person should be and hereby is vested in another person" says "such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of the government among three co-ordinate departments." In speaking of constitutional provisions forbidding the taking of property without compensation

the court in *Bradshaw* v. *Rodgers*, 20 Johnson (N. Y.), 105, says: "They are declaratory of a great and fundamental principle of government and any law violating that principle must be deemed a nullity, as it is against natural right." In *Harness* v. *C. & O. Canal Co.*, 1 Md 248, the court says:

> "There was a principle of right and justice inherent in the nature and spirit of the social compact which restrained and set bounds to the authority of the legislature and beyond which it could not be allowed to pass, that principle which protects the life, liberty and property of the citizen from violations in the unjust exercise of legislative power."

To same effect see *Cairo & Fulton R. R. Co.* v. *Turner*, 31 Ark. 494; *Doe* v. *Georgia R. R. Co.*, 1 Ga. 24; *Loughbridge* v. *Harris*, 42 Ga. 501; *Lennickson* v. *Johnson*, 17 N. J. L. 129.

The legislative power conferred upon Congress by the Federal Constitution does not include the power to compel a citizen to engage his services and capital in a business contrary to his will even though the effect might be one method to prevent monopoly in the purchase of oil. We do not overlook that it is claimed that the amendment neither requires pipe line owners to become common carriers, nor prevents them from using the pipes for the transportation of their own oil but merely prescribes conditions upon which pipe lines may be used for the transportation of the owner's oil. Waiving all consideration as to the validity of this claim with respect to pipe line owners who became such subsequent to the passage of the amendment, it is without merit when made

against the appellee which at great expense had constructed its lines long prior to the passage of the amendment. The petitioner must become a common carrier or suffer the utter loss of millions of dollars' worth of property. And this *is* compulsion.

A condition which one is compelled to perform is not a condition. An option which one must exercise or submit to a loss of millions is not an option. To forbid the pipe line owner becoming a purchaser or to forbid him to transport oil would be the natural, direct and effectual means by which to prevent the monopoly he is claimed to have in the purchase of oil. That remedy would not give others the benefit of the facilities he has provided for the transmission of his own oil. To attempt to remedy such alleged monopoly by compelling him to engage his means and his services in a line of business in which he is not engaged and in which he does not wish to engage is an inexcusable, unnecessary and arbitrary exercise of supposed power.

THE FIFTH AMENDMENT.

The construction contended for is in violation of the fifth amendment to the Federal Constitution.

There is here a "taking" within the meaning of the fifth amendment, without compensation. The record shows that the utmost capacity of the pipe line system of this appellee is required for the transportation of its own oil. Also that although designed for and adapted to the transportation of oil of widely varying grades belonging to the same owner, the system as now con-

structed cannot be used for the transportation of oil of varying grades belonging to different owners (affidavit of J. E. O'Neil, Record p. 26). To extend the capacity of the pipe line and change the character of its construction so as to enable the petitioner to serve the general public would necessarily require a heavy initial outlay and expenditure of capital (Record, p. 31). That such compulsory expenditure of the capital which is required in its own busines in order to enable it to engage in the service of the general public would be a taking of property within the meaning of the fifth amendment is conclusively shown by the decision in *Mo. Pac. R. R. Co.* v. *Nebraska*, 217 U. S. 196, 30 S. C. R. 461, cited *supra* In that case a state law required the company to put in sidetracks for the accommodation of whoever might erect an elevator of a certain capacity by the company's right of way. In that case also it was intimated, if not urged, that the elevators with which the company saw fit to connect, had or might have a monopoly. The court though not questioning but that the manifest effect might be to prevent monopoly, held that the involuntary expenditure necessary for the construction of the sidetracks was a "taking" of property within the constitutional inhibition.

In other features also, this case will be found instructive. The act in question, as before shown, makes no distinction as to pipe line owners who are not also oil purchasers. The fact that the utmost capacity of the pipe lines system may be required for the transportation of the owners' own oil, as well as the fact that the appellee has on hands vast quantities of oil ready for shipment

are wholly ignored. All pipe line owners must at once enter into the service of the general public.

In the case cited the court says:

> "This statute has no reference to special circumstances. It is universal in its terms. If we were to take it literally it makes the demand of the elevator company conclusive without regard to special needs, and possibly without regard to place."

It may be urged that the rights of the public would be subservient to the necessities of the pipe-line owner with respect to the transportation of his own oil. But the act as construed makes no such distinction and allows no such latitude. The pipe-line owner is on precisely the same footing with respect to the transportation of the oil which he has produced or purchases, as any other oil owner. All who wish to transport oil are on an equality before this law. The rule "first come first served" would apply. The limited capacity of the system coupled with the fact that other shippers may have previously tendered oil for transportation, would often compel an indefinite postponement in the transportation of the oil of the pipe line owner.

The Taking.

But aside from the involuntary expenditure necessary to enable the pipe-line owner to become a common carrier, there is here the "taking" contemplated by the fifth amendment. Every essential element is here present in the most technical sense of the word. When engaged in the transportation of his own oil, the pipe-line owner acts in one capacity. When engaged in the transportation of oil for the public he is acting in a wholly different ca-

pacity. Although he may be the same person in fact, in law he is a different person. The two capacities are distinct and the two persons are distinct, as much so in fact as if the law had provided that whenever the oil of others should be tendered for transportation some outsider should step in and take charge of the system. Whoever may have charge of the system while being used for the transportation of oil for the public, the pipe-line owner in his capacity as owner, has been dispossessed utterly and completely. But not only so when used for the transportation of oil belonging to others. Even when used for the transportation of the pipe-line owner's own oil in his capacity, as an individual property owner, he is dispossessed. Though he still has title as an individual owner he no longer has the use as an individual of the line. From the time this act goes into effect, if defendant's contention be accepted, the petitioner will no longer have the possession and use of this property as individual owner, but as an involuntary agent for the general public. His own oil as compared with oil of others transported may be negligible in quantity, he may even see fit to cease carrying his own oil or go out of the oil business entirely, but the law makes no exceptions. Regardless of all conditions whatsoever the act as construed, takes the pipe-line system out of the possession of the pipe-line owner, as such, and puts it into his possession as involuntary agent for the general public, and he thence forth stands on the same footing as any other person. Now we ask what essential element necessary to constitute the "taking" contemplated by the fifth amendment is wanting?

It may be claimed that the commission would have the power to provide that the obligation of the appellee to transport for others should be dependent upon the extent to which the capacity of the line at any particular time might be required for the transportation of the pipe line owner's own oil. But the commission has only such power as is expressly conferred. As before stated all proposed shippers, the pipe-line owner included, stand upon an even footing. The rule "first come first served" would apply to the transportation of oil belonging to the owner of the pipe-line. Section 3 of the original act expressly forbids any special advantage to one over another shipper. It would not be within the power of the commission to remedy the invalidity of the act by interpolating regulations and conditions not found in the act iteslf. That the act as construed would be invalid because of its failure to make the obligation of the pipe-line owner to transport oil for the public dependent upon the necessities of the pipe-line owner as to the transportation of its own oil, and the inability of the commission to supply such omissions in the act, is clearly shown by the decision in *Louisville* v. *N. R. R. Co.* v. *Central Stock Yards Company*, 212 U. S. 132, 29 S. C. R. 249. In that case a state law required the carrier to interchange cars with connecting carriers for through traffic. It was claimed that in the absence of provision for protection against loss or undue detention, and for securing compensation for the use of the cars, there was here a taking without compensation. In response it was claimed that the courts could supply the omission. But the court says:

> "The constitution of Kentucky is simply a universal undiscriminating requirement such as we have described. The want cannot be cured by inserting them in judgments rendered under it. The law itself must save the party's rights and not leave them to the discretion of the court."

Wherefore the conclusion is irresistable, that under the act as construed by defendant, the pipe-line owners would be under obligation to transport all oil presented for shipment including its own oil, in the order of presentation. Its own oil might be a very small percentage of the total amount presented for shipment. Owing to the limited capacity of the lines, the delay in the shipment of its own oil might be interminable. During this interval of delay at least, the petitioner would be as utterly dispossessed of its property and there would have been as complete a "taking" as if such interval were prolonged forever. Also under the authority last cited, the commission would be powerless to afford a remedy. But as before shown, even when the time finally arrived when in the order of its presentation, the petitioner engages in the transportation of its own oil, it will not be acting in its capacity as individual owner but will still be acting as agent for the general public.

As before shown there is here a complete physical dispossession of the pipe lines and receiving tanks. Today the system is the private property of the pipe line owner and in his actual physical possession in his individual capacity. After the act, as construed, goes into effect, it would not be in possession of the same legal person. The person might be the same but he would be

acting in a different capacity. Under compulsion of the act, he would have charge of the property in performing a service for the public, and this would be an actual physical dispossession and an actual physical dispossession is a "taking." The fact that there is no divesting of title, but rather a temporary divesting of the physical possession and use is wholly immaterial. This was expressly decided in *Louisville & Nashville Ry. Co.* v. *Central Stock Yards Company*, 212 U. S. 132, 29 S. C. R. 249. In that case one company was required by a state law to allow a connecting carrier the temporary use of its cars. There was however no provision securing compensation for such temporary use. The court says:

> "It was argued, however, that the requirement that plaintiff in error should deliver its own cars to another road was void under the 14th amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for traffic. We do not pass upon that question. It is enough to observe that such a law ought perhaps, to be so limited as to respect paramount needs of the carrier concerned, *and at least could be sustained only with full and adequate regulations for his protection* from loss or detention of cars *and for securing compensation for their use*. (Italics ours.) The Constitution of Kentucky is simply a universal, undiscriminating requirement with no ade-

quate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights and not leave them to the discretion of courts as such."

It will be noticed that the above quotation refers to, though it does not pass upon, another objection to the act as construed by defendants. We refer to the fact that as construed by defendants, the pipe line owner would be required to serve the public without regard to what his necessities might be for the transportation of his own oil. In view of the limited capacity of its lines, as shown by the record, this would by no means be a mere theoretical objection.

> "Any actual and material interference with private property rights is a 'taking' of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation."
>
> *Board of Commrs.* v. *Gates*, 93 N. E. 256.

The contention that the temporary deprivation of the use of the pipe lines by the pipe line owner during the time his lines are being used for the transportation of the oil of the public is not a taking of property is based upon a radical misconception of the meaning of the word "property." The right to use property *is* property.

> "A little reflection will suffice to convince anyone that property is not the corporeal thing itself of which it is predicated, but certain rights in or over the thing. Land undergoes no corporeal change by

the mere fact of being reduced to the domain and ownership of man. An animal *ferae naturae* may be precisely the same after as before capture, but in his former state, no one would speak of him as property. We must look therefore beyond the thing itself, beyond the corporeal object for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These are the rights of user, the rights of exclusion and the right of disposition."

Lewis on Eminent Domain, Section 52.

"Property itself in a legal sense, is nothing more than the exclusive right of possessing, enjoying and disposing of a thing which of course includes the use of a thing."

Chicago & Indiana R. R. Co. v. *Englewood Connecting Ry. Co.*, 115 Ills. 375.

There will be here something more than an interference with the use of the property by the pipe line owner. During the time the line is being used by the public, there would be an actual physical dispossession of the owner and an absolute deprivation of his exclusive use.

"The word 'property' in the tenth article of the bill of rights, which provides that 'whenever the public exigencies require that property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefor,' should have such a liberal construction so as to include any valuable interest which can be enjoyed as property and recognized as such." C. J. Shaw in *Old Colony & Fall River R. R. Co.* v. *County of Plymouth*, 14 Gray, 155-161.

"The word property 'is used in the constitution in a comprehensive and unlimited sense, and so it must be construed. It is not any particular kind of property that is mentioned, but the wording is, 'no private property.' It need not be any physical or tangible property which is subjected to a tangible invasion. The right to the use and possession of a lot abutting on a public street is property. The right to light and air and access is equally property. * * * And the modern authorities are uniform that these are rights which are guaranteed by constitutional provisions similar to ours.'

"If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed, and it may be laid down as a general proposition, based upon the nature of property itself, that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanta*, taken, and he is entitled to compensation. Any substantial interference with private property which destroys or lessens it value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact, and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed.

"It will thus be seen that in order that there may be a recovery of compensation for damages to property no part of which is taken, such damages must be the result of a violation of some one or more of the rights which constitute property. In other words, the damage must be actionable damage, that is, damage which would be remediable if done by an individual without any pretense of statutory authority. * * *

"These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' If property in land consists in certain essential rights, and physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference

annuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then he had an unlimted right; now he has a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? * * * The principal must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it."

Lewis on Eminent Domain, page 56, 57, 60 & 61.

Under these authorities the compulsory use of a private pipe line by a private owner contemplated by the act as construed by defendants would unquestionably constitute a taking.

The fact shown by the record in this case, that the utmost capacity of the petitioner's lines might be required for the transportation of its own oil, or that to comply with the law might require it to exhaust its capital in the construction of new lines for which it would have no use in the conduct of its own business, would make no difference.

Such an enactment would be without precedent in the history of legislation. In the Munn case and in every

one of the numerous cases in which the rule laid down in that case has been followed, the decision was based upon the fact that the owner of the property had himself devoted the property to a public use. This element is wholly absent in this case. In fact the refusal of appellee to so devote its property constitutes the sole basis of appellant's claim. To sustain the construction contended for by appellant will require a far advance beyond anything found in the Munn case.

A case nearly in point is that of *Brass* v. *The State of North Dakota*, 153 U. S. 391. In that case the respondent was engaged in the business of purchasing grain to market. That was his principal business. He owned and used in his business an elevator. All grain purchased by him at his elevator was purchased for the sole purpose of being shipped to and sold outside the state. At certain seasons of the year the full capacity of his elevator was not required for the handling of his own grain. At such times he was accustomed to receive for profit the grain of other parties for storage in his elevator. The Legislature of North Dakota enacted a law that all elevators then or thereafter to be erected and operated for the purpose of buying, selling, storing or handling grain for profit should be public warehouses. Thereafter the relator tendered grain for storage and offered to pay the required charges. The respondent refused to receive the grain. The distinction between that case and the case at bar is this: The respondent had been and was in the business of storing grain for the public. In this case the appellee constructed its lines with a view to handling its own property exclusively, and it never has done business

for others, and to enable it to do business for others, it would be necessary for it to change the construction and arrangement of its property and lines. The court, in its opinion sustaining the Dakota law, distinctly recognized the distinction between that case and the case at bar.

The Court says:

> "Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error in connection with his warehouse, is in storing his own grain and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouse man for others. *We do not understand the law to require the owner of a warehouse built and used by him only to store his own grain to receive and store the grain of others* (italics ours).
>
> Such a duty arises only when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the arbitrary regulations and he cannot escape them by asserting that he also elevates and stores his own grain in the warehouse."

But we wish to call attention particularly to the fact that the decision in a case which was so much more favorable to the relator than is this case to the appellant was by a divided court, there being four dissents. There can be little doubt but for the fact the elevator in that case was in fact used for the storage of grain for others, the decision would have been the other way.

Also, *United States* v. *Delaware & H. Co.*, 213 U. S.

366, the Delaware & Hudson Company was authorized to secure coal lands and mine coal, also to conduct a railroad for the purpose of transporting on its own account the product of its mines, and it actually engaged in such business. For this reason it claimed that it was to be considered as a coal company rather than a railroad company. The answer of the company, however, was that it had become "incidentally to its business as a coal mining company a common carrier by railroad of passengers and property." The court, speaking of the contention made in its behalf that it should be considered as a coal company and not as a railroad company, says:

> "The contention is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such, we think it was a railroad company within the meaning of the clause and subject to the regulations embodied therein."

And here again, the decision to sustain governmental interference was based upon a fact wholly wanting in this case.

To the precise extent that the appellee's property is appropriated to the use of others against its will, there would be a taking within the meaning of the fifth amendment. Just to what extent the appellee would be prevented from using its lines in the transportation of its own oil, and the extent that the capacity of the lines would be required for the transportation of oil belonging to

other parties, it would be impossible to say, but inasmuch as the law requires a common carrier to receive and transport for the public to the full extent of its capacity, the taking is necessarily to that extent. That such an appropriation of the petitioner's property would bring the case within the spirit of the fifth amendment is clear.

> "It would be a very curious and unsatisfactory result if in construing a provision of a constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the use of the public, it can destroy its value entirely, and inflict irreparable injury to any extent; can in effect subject it to total destruction without making any compensation because in the narrowest sense of that word it is not taken for public use. Such a construction would convert the constitutional provisions into a restriction upon the rights of the citizen, as these rights stood under the common law, instead of the government, and make it an authority for invasion of private right under pretext of the public good, which had no warrant in the laws or practice of our ancestors."
>
> *Pumpelly* v. *Green Bay & Canal Co.*, 13 Wall. 116.

In *United States* v. *Lynah*, 188 U. S. 445, the court says:

> "Was there a taking? Here was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the land owner to the government, and if either of these is an essential element in the taking of lands within the meaning of the fifth amendment, there was no taking."

The court then proceeds and after quoting the Pumpelly case, 13th Wallace, *supra*, and various state decisions to the same effect, concludes as follows:

> "Therefore, following the settled law of this court, we hold that there has been a taking of the land for the public use and that the government is under an implied contract to make just compensation therefor."

But the proposition that the decision in the Munn case, that the right of the public to interfere with the functions of private ownership depended upon the fact that the owner had himself devoted his property to a public use, is not left to inference. In that case, 94 U. S. 113, the court says:

> "Looking then to the common law from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only. * * *" Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the country at large. *When therefore one devotes his property to a use in which* the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be

controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.*"

And this quotation is copied with approval in *Cotting* v. *Goddard*, 183 U. S. 85. From which it appears that even if the petitioner had been engaged in transporting for the public at the time of the making of the amendment, it could have withdrawn itself from the operation of the act by using its lines exclusively for the transportation of its own oil. And this is precisely what was done in *Weems Steamboat Company* v. *Peoples Steamboat Company*, 214 U. S. 345. In that case the syllabus is as follows:

"The owner or lessee of the exclusive right to use a wharf on a navigable river need not permit its use by others upon the payment of reasonable compensation therefor because there is no other wharf at that point, or because such use is convenient, and has been permitted by the former owner or lessor." The court in that case says:

"The case of *Munn* v. *Illinois*, 94 U. S. 113, has in our judgment no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described, to charge what they pleased for the doing of the business in which they were engaged. Their property was being used with their consent, and its use devoted to the public, to any extent desired, and the only question was in regard to the compensation which they were entitled

to ask for the business done. The complaint was that the charges were too great and were a violation of the law of the state, and were not reasonable, and the answer made by the owner of the property was that it was their private property, and they had the right to charge what they desired."
The court said:

"As you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use, and the right, on the part of the state to regulate charges that you shall make, to the end that they shall be just and reasonable."

"If the owner of one of these wharves had devoted it to a public use and permitted the public to use it as it desired and demanded compensation for such use, the question as to the amount of such compensation might be raised as in the Munn class of cases. The legislature has passed no law regulating charges, if that be material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including the defendant. The only question is whether a third person has the right to use a private wharf on tendering compensation therefor because there is no other wharf at that place or because it would be more convenient to such third person to use it, or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. There is no more reason why such property should be held subject to the right of others to use it against the will of the owner than there is for any other kind of property so held."

That the right of private contract is property which cannot be taken without compensation.

Lochner v. *New York*, 198 U. S. 45.
Matthews v. *People*, 202 Ills. 389.
State v. *Nelson*, 129 Mo. 163.
Harbison v. *Knoxville Iron Works*, 103 Tenn. 421.

That property cannot be taken under the police power without compensation.

C., B. & Q. Ry. Co. v. *Ills.*, 200 U. S. 361.
Mo. Pac. Ry. Co. v. *Nebraska*, 217 U. S. 196.

All of which is respectfully submitted.

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No. 507.

No. 1054.

Supreme Court, U. S.
FILED.
OCT 7 1913
JAMES H. McKENNEY,
CLERK.

In the

Supreme Court of the United States

October Term, 1913.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

THE UNCLE SAM OIL COMPANY, *Appellee*.

BRIEF ON BEHALF OF THE UNCLE SAM OIL COMPANY, APPELLEE.

ALBERT L. WILSON,
Solicitor for Appellee.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1913.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

THE UNCLE SAM OIL COMPANY, *Appellee*.

BRIEF AND ARGUMENT ON BEHALF OF THE UNCLE SAM OIL COMPANY, APPELLEE.

No. 1054.

STATEMENT.

The Record, page 1, shows that this action was commenced in the United States Commerce Court by The Uncle Sam Oil Company, Appellee, on July 23, 1912, by filing in said court its petition for an injunction, and that the petition states the following facts (Record, pp. 1 to 8, inclusive):

1. That appellee, The Uncle Sam Oil Company, was duly and legally incorporated as a private corporation under the laws of the Territory of Arizona in February, 1905, for the purpose of producing crude petroleum, transporting it from its oil wells to its refineries, refining and marketing the same, and that ever since said incorporation appellee has been and now is a private mining and manufacturing corporation, existing under the laws of Arizona and doing a private business according to law.

2. That on the date of its said incorporation the law under which it was incorporated prohibited it from constructing or operating any railway, tramway, or other means for transporting persons or property for hire, and specifically provided that appellee should have no power to construct or operate any means for transporting persons or property except such as may lead from the principal works or place of business of appellee to some navigable stream, or to some existing railroad, turnpike, or public highway, and that said law then became and now is a part of the charter of appellee, and thereby appellee has no power to engage in the business of transporting persons or property as a common carrier.

3. That immediately after the date of its incorporation as aforesaid, appellee erected, at large expense, one of its refineries for refining crude petroleum, near the city of Cherryvale, in the State of Kansas, and drilled in many oil wells on its leased land in the Osage Indian Reservation, in the State (then Territory) of Oklahoma; that it markets its refined products by establishing distributing stations in the trade centers most accessible to each of its

refineries, at which stations it has erected large storage tanks and equipment, and has tank wagons to make delivery of the products which it ships to said stations by the carload; that it now has about eighty stations in Kansas, Oklahoma and Missouri depending chiefly upon said refinery for their supply of refined oils; that it applied to the Atchison, Topeka & Santa Fe Railway Company, the only railway line extending from the oil wells of appellee to the said refinery of appellee, and demanded that said railway company should transport the oil from the wells to said refinery and at a fair and reasonable rate; that at said time appellee was producing, refining, and marketing its oil in competition with The Standard Oil Company, which company had its vice-president and active manager, H. H. Rogers, and other representatives upon the board of directors of said railway company; that said railway company established a freight rate of 39 cents per barrel on crude petroleum, from the oil wells of appellee, near the city of Bartlesville, Oklahoma, to the refinery of appellee, near the city of Cherryvale, Kansas, a distance of approximately sixty miles, and provided that appellee should provide the tank cars in which such crude oil should be shipped; that the market price of crude oil at that time was only 35 cents per barrel, and the price of refined oil was such as to make said freight rate prohibitive; that it was excessive, unreasonable, and unjust; that appellee could not pay said rate and continue its competition with the Standard Oil Company with the products of said refinery; that to avoid such ruinous freight rate appellee was compelled to and did construct a three-inch pipe line, extending from near its oil wells and near the said

city of Bartlesville, in the State of Oklahoma, to its refinery near the said city of Cherryvale, in the State of Kansas, and connected its said oil wells with said pipe line by smaller gathering lines in the oil field; that since in the year 1906 appellee has operated said pipe line, pumping its own oil from the wells in Oklahoma to its said refinery in Kansas, and supplied said distributing stations from said refinery, and maintained its competition with the Standard Oil Company, in spite of said freight rate.

4. That during all of the time since constructing said pipe line, appellee has used the same for the sole and exclusive purpose of conducting or gathering its own oil from the wells to its refinery, and such use has been necessary; that appellee has never transported any oil for any other person, firm, or corporation; that appellee during all of said time has never been requested to transport any oil for others from Bartlesville to Cherryvale or *vice versa;* that the market price for crude oil has remained the same at Bartlesville as at Cherryvale, and there has been and now is no reason why any person, other than appellee, should desire to transport any crude oil from Bartlesville to Cherryvale or from Cherryvale to Bartlesville; that there is no refinery for refining crude oil at Cherryvale except said refinery of appellee, and it is supplied from the wells through said pipe line.

5. That appellee has at no time held itself out to the public as willing to carry oil for the public by means of said pipe line, nor that it was willing to assume the duties and obligations of a common carrier; that appellee has no power to engage in the business of a common carrier; that it has no facili-

ties for receiving, storing, transporting, and delivering to another, any oil that might be tendered for shipment; that the oil in that oil field is of different grades, quality and value, and appellee has no means whereby it could receive, store, transport, and deliver to another the same oil that should be tendered for transportation; that under these conditions it is physically impossible for appellee to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or owner the same oil which may be tendered for shipment.

6. That the transaction whereby appellee produces the crude oil at the wells, gathers it from the wells, and pumps it to its refinery as above stated, is a transaction wholly within appellee; that there is no other person concerned with it and no element of commerce in it; that it is purely a private transaction, and does not come under the jurisdiction of the Interstate Commerce Commission; that there is no law giving said Commission any right or authority to interfere with or molest appellee in the free use of its said pipe line in the conduct of its said private business; that appellee is the lawful owner of said pipe line, and has the right under the Constitution and laws of the United States to possess, use and enjoy said pipe line free from the dominion, interference or control of said Interstate Commerce Commission or anyone else; that the *right to refuse to surrender said pipe line to the public is property belonging to appellee* and cannot be taken from appellee without due process of law.

7. That said pipe line is necessary to enable appellee to prosecute its business and maintain its

competition with the Standard Oil Company; that the entire capacity of said pipe line is and will be constantly required to supply the refineries of appellee; that appellee anticipates that in the near future it will be necessary to enlarge the line to meet the requirements of appellee's own private demands thereon, and that if appellee should be required to surrender to the public the use of said pipe line, it would be compelled to close its said refinery at Cherryvale, Kansas, for lack of facilities to transport its own oil from its wells to its said refinery; that its private business would very injuriously be affected, and its ability to maintain its competition with the Standard Oil Company in the territory now supplied by said refinery would thereby be greatly diminished, if not destroyed.

8. That heretofore the Interstate Commerce Commission, upon its own motion, instituted certain proceedings entitled "In the Matter of Pipe Lines, No. 4199," for the purpose of determining its jurisdiction over and concerning certain pipe lines in the United States, among which is the pipe line of The Uncle Sam Oil Company. Appellee and various other corporations and partnerships were made respondents, and on the 8th day of June, 1911, the Interstate Commerce Commission made a certain order, set out in full in the petition.

That said order was duly served on appellee. Thereafter, at certain hearings provided by the Commission, testimony and other evidence having been offered, received and considered by the Commission, on the 28th day of March, 1912, the Interstate Commerce Commission made a further order and caused the same to be duly served on appellee and the other

respondents in said proceeding, propounding certain questions of law to each and all of the respondents in said proceeding, and requesting and directing that respondents appear before said Commission in the City of Washington on the 10th day of May, 1912, for the argument and hearing of the questions of law submitted as aforesaid.

9. That, as directed in said order, appellee appeared and submitted its brief and argument in writing. Afterwards, on the 3d day of June, 1912, the Interstate Commerce Commission made, rendered, and published its report, in the nature of findings of fact and conclusions of law, accompanied by a further order of said Commission in said proceeding, a copy of which report and order is attached marked Exhibit "A," and made a part of the petition.

10. That by the terms of said last mentioned order appellee was required on or before September 1, 1912, to file with the Interstate Commerce Commission schedules of its rates and charges for the transportation of oil, as a common carrier, in compliance with the said Commission's construction of the provisions of the Act to Regulate Commerce. That appellee has not now and never has had any schedules of rates and charges for the transportation of oil. It has never transported nor offered to transport any oil other than its own oil. Its incorporation was procured, its stock subscribed and sold, for the purpose of engaging in a private business, in manner and form that said business is now and heretofore has been conducted by appellee. That the stockholders and directors of The Uncle Sam Oil Company have never given their consent, or in any manner authorized the managing officers of

appellee to divert the property owned by it or any part thereof from the necessary private uses in which it is now employed, to the public service, or to the service of any other person, and they have no power to do so. That the pipe line of The Uncle Sam Oil Company cannot, nor can any part thereof be employed in the transportation of oil for the public or any other person without impairment and destruction of the value of the same to its owner as a necessary, economical and efficient means of carrying on, conducting and maintaining the business in which it is now engaged. That the order of said Commission last above referred to and set out in Exhibit "A" to the petition, is illegal and void, for the reasons, *first*, because the Interstate Commerce Commission does not have and possess any jurisdiction or control over the pipe line of appellee, or any lawful authority to make such order; *second*, because said order, should the same be made effective and be enforced, would impose all the burdens, liabilities and responsibilities of a common carrier upon appellee without its consent, without its power to assume them, and deprive it of its property, the use and control thereof, without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, and *third*, because said order, should the same be enforced and become effective, would render the pipe line of appellee ineffective and inefficient for the purpose for which it was constructed and ever since has been used, and appropriate the same to the service of the public, to the exclusion of the use thereof by the owner, which would be a taking of the private property of appellee for a public use without just compensation,

in violation of the Fifth Amendment to the Constitution of the United States.

11. Appellee further avers that if said order of the Interstate Commerce Commission is allowed to become and be effective, many suits for penalties would be brought against appellee by many persons interested in said order and its enforcement, and claiming to be injured by the acts of appellee, which suits would be prose uted as aforesaid by very many persons in the judicial districts of the United States against appellee, whereby appellee would be subjected to a great multiplicity of suits, and great loss and damage would be inflicted upon it, all of which would greatly injure and embarrass appellee in the transaction of its business, unless said order be obeyed, and appellee thereby surrender and be deprived of the use and enjoyment of its own private property, to its irreparable injury through the impairment and destruction of its ability to carry on the business in which it is now engaged and to which the present employment of its pipe line is essential and necessary.

12. Appellee further avers, notwithstanding the facts aforesaid, that said Interstate Commerce Commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of the Court, maintain the said order as an effective order, and institute or cause or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience, and violative of the property rights of appellee.

13. Appellee therefore prayed that upon the filing of the petition a temporary or interlocutory

order be entered therein, suspending the said order of the said Interstate Commerce Commission and restraining the enforcement thereof and restraining the said Intersfate Commerce Commission from taking any steps or instituting any proceedings to enforce said order, and upon the final hearing of the cause that a decree be entered therein setting aside and annulling said order of the said Interstate Commerce Commission therein complained of, and perpetually enjoining the enforcement of the same, and that appellants and its agents, servants and representatives, and each and all of them be perpetually enjoined from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the same.

Appellee further prayed that if any delay intervened between the filing of the petition and the issuance of a temporary or interlocutory order, as prayed for therein, then and in that case an order be entered suspending the said order of said Interstate Commerce Commission, restraining and enjoining the enforcement thereof until the hearing and final determination of the application for a temporary or interlocutory order prayed for therein, and appellee further prayed that it be granted such other and further relief in the premises as justice and equity may require.

Appellee further prayed that the court grant unto it a writ of subpœna to the United States of America, and that due service thereof be made on the appellants the United States and the Interstate Commerce Commission, commanding them at a certain day and under a certain penalty therein to be specified, to appear before the court and then and

there full, true and complete answer make to all and singular the premises; but not under oath (an answer under oath being thereby expressly waived), and to stand and abide by such order and decree therein as to the court shall seem meet and agreeable to equity and good conscience.

To this petition the appellants, the United States and the Interstate Commerce Commission as intervenor have filed answers which practically admit the material facts stated in the petition, but set forth certain reasons why, as they claim, appellee should be decreed a common carrier and subject to the rules and regulations of the Interstate Commerce Commission. The answers allege that a part of the pipe line of the appellee was laid upon a right-of-way secured from the Indians through the Secretary of the Interior, and that said right-of-way was applied for and accepted by the petitioner under rules and regulations of the Interior Department, dated December 21, 1906, which provided that the person applying for and accepting the right-of-way should consent that the pipe line should be a common carrier. (Record, pages 9 to 46, inclusive.) But the record (pages 45 and 47, 48) shows that the application for the right-of-way for this pipe line was made by appellee on February 16, 1906, and filed in the department February 27, 1906; that the same was recommended for approval March 15, 1906, and approved by Thos. Ryan, First Assistant Secretary of the Interior, March 26, 1906, under the law and rules then in force which did not require the applicant to consent that the pipe line should be a common carrier. This record further shows that the pipe line was com-

pleted and in full operation on November 16, 1906, upon the right-of-way thus approved. The record does show that a corrected map of the right-of-way thus approved was called for by the Department on December 5, 1906. Said map to have added thereto, as the correction called for, the field notes of the surveyor. This map was returned to the Department with the field notes called for attached, January 1, 1907, and in that form it was approved by the Secretary of the Interior, January 23, 1907, but in the approval of this map the Secretary distinctly states that the application for right-of-way had been approved March 26, 1906. (Record, page 45.)

The record further shows that the rules and regulations of the Interior Department were amended in 1909, and that portion which required the pipe lines to become common carriers was omitted from the rules and all matters touching that question were thereby repealed. (Commerce Court opinion, page 45.) The record does not show that the appellee had any knowledge or notice of the rules and regulations, dated December 21, 1906, when it returned to the Department the map with the field notes of the surveyor attached, but does show that the appellee had no knowledge or notice of the rules and regulations of December 21, 1906, prior to their repeal in 1909, and that said right-of-way was applied for and accepted and said pipe line laid thereon under the law and rules and regulations existing between February 17th and November 16th, 1906, and that appellee at no time had knowledge or notice that it would be required to consent that its pipe line should be a common carrier, and that at no time did it give such consent. (Record, pages 47, 48.)

The petition of the appellee expressly waives an answer under oath. (Record, page 8.) Therefore, the answer of appellants, while verified, could not be used as evidence on the hearing for the temporary injunction. All of the allegations of the petition of the appellee were supported by the affidavits of two witnesses. (Record, pages 47 and 48.) And none of the allegations were denied in any manner except by said answer.

The appellant Interstate Commerce Commission, in its answer (Record, page 10) says: "This respondent neither admits or denies the allegations in said petition to the effect that the petitioner produces or owns all the crude oil which it transports." And appellant The United States makes no denial of said fact in its amended answer (Record, pages 43 to 46, inclusive.) And neither of the answers of appellants controvert the material facts stated in the petition of the appellee. The court, therefore, was bound to assume that the facts stated in the petition of the appellee were true. Finding these facts to be true, the court granted the temporary injunction prayed for, and this appeal is prosecuted by appellants to obtain a reversal of said order.

BRIEF AND ARGUMENT.

First: The provisions of the Interstate Commerce Act apply only to common carriers at common law.

I. This is the reasonable interpretation of the language of the Act itself.

Section 1 of the Act was entirely re-enacted by Sec. 7 of the Act of June 18, 1910. As so amended, Section 1 reads in part as follows (italics mine):

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons *engaged* in the *transportation* of oil * * * by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph and telephone and cable companies * * * *who shall be considered and held to be common carriers within the meaning and purpose of this Act*, and to *any common carrier or carriers engaged* in the *transportation* of passengers or property wholly by railroad * * *."

1. The words italicized, "*who shall be considered and held to be common carriers within the meaning and purpose of this Act,*" must be held to qualify and restrict the language "any corporation, etc., *engaged in the transportation* of oil * * * by means of pipe lines, etc." That is to say, the Act is to be interpreted as if it said that its provisions "shall apply to any corporation" (who shall be considered

and held to be *a common carrier at common law*) * * * "engaged, etc., * * *, shall be considered and held to be," a common carrier under the Act.

2. Otherwise it is necessary to assume that the Act is to be construed to mean that its provisions shall apply "to any corporation, etc., engaged in the transportation of oil * * * by means of pipe lines, etc.," * * * *and they* "shall be considered and held to be common carriers within the meaning and purpose of this Act." But the principal provisions of the Act apply, and originally applied, only to railroads, and the Act specifically limits their application to those railroads which are common carriers. A construction should not be favored which makes Congress, in the same Act, adopt a different policy in regard to pipe lines from that adopted in regard to railroads, with which the Act is chiefly concerned. Had that been its intention, it could and should have been clearly expressed. Instead of saying "who shall be considered and held to be common carriers within the meaning and purpose of this Act" it would have said "who are hereby declared to be common carriers within the meaning and purpose of this Act." The omission of language clearly having that effect is of vital significance, particularly when it is sought to bring corporations and persons within the Act as common carriers who are not common carriers in any sense known to the law.

Said Section 7 defines the word transportation as used in said Act in the following language:

> "The term 'transportation' shall include cars and other vehicles and instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied,

> for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This is what Congress meant by the word "transportation" in the clause making the Act apply to any corporation or person "engaged in the transportation of oil." In other words the Act is made to apply only to those "engaged" in the "receipt," "shipment," "storage," and "delivery" of oil. This means those engaged in furnishing such facilities and service for others. The words "receipt," "storage" and "delivery" would not be used in describing the business of appellee, but are necessary in the description of the business of one who receives, transports, stores and delivers oil for others. In fact, the entire Act is taken up with provisions regulating the conduct of common carriers with the public and it has no application to appellee or its business as set forth in the petition.

> "Of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act amended."
>
> *Griffins Case*, Chase (U. S.) 364.
> *Van Riper* v. *Essex Public Road Co.*, 38 N. J. L. 23.

In *Wade* v. *Lumber Company*, 74 Fed. 517 (C. C. A., 5th Circuit, 1896), the court was considering an article of the State Constitution of Louisiana, which

provided, in substan e, that all railroads were public highways and all railroad companies were common carriers. At page 521 the court said:

> "But for the earnestness with which the argument was presented in this court, we would not suppose that the learned counsel would seriously contend that Article 244 of the state constitution, dealing with corporations of public improvement and public utility, was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared a common carrier. * * * The proposition that an individual or corporation may build a railroad wholly on his own land, for his own business, without making the same a common carrier, we do not doubt."

Judson on Interstate Commerce, 2d Ed. (1912), at page 220, says in part, referring to the language of Sec. 1 of the Interstate Commerce Act:

> "As to the owners of pipe lines who are not common carriers and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act."

3. If, however, the words *"who shall be considered and held to be common carriers within the meaning and purposes of this Act"* were to be con-

strued as a declaration by the Act itself that the corporations and persons described are to be deemed common carriers within its provisions, the question would still remain, who are the corporations and persons so described? The language is "any corporation or any person or persons *engaged* in the transportation of oil * * * by means of pipe lines * * *." That means corporations or persons engaged in such transportation as a business—that is, for profit. It does not mean the transportation by a corporation or person of oil through its or his own pipe lines merely as an adjunct to the operation of the manufacturing business in which it or he is engaged. Do we speak of a company engaged in manufacturing which operates a railroad on its own right-of-way to bring to it coal or ore from some nearby railway system as "*engaged*" in the transportation of coal or ore? It is transporting coal and ore by railroad, but it would not be described as "engaged" in the transportation of coal and ore, because the obvious implication of that language is that it is engaged in it as a business. In other words, a mining or manufacturing company is engaged in mining and manufacturing, to which the transportation by itself of articles which it uses in its mining or manufacturing may be an incident, and the fact that it is such an incident would not bring the company within the description of one *engaged* in transportation. That language can only be appropriately used when transportation is the direct and principal occupation or business of the corporation. This is particularly true in view of the fundamental public purposes of the Act.

In *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, at page 276, Mr. Justice Brown said:

> "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

See, also, *Interstate Commerce Commission* v. *Harriman*, 211 U. S. 407, 418.

These objects have no application or pertinency to a private railroad or pipe line; and the fact that they have not furnishes a convincing reason against a construction of the Act which would bring such railroads or pipe lines within its terms or operation. To apply the Act to a new subject presupposes an existing public use in connection with it in need of the regulation which the Act provides.

4. From no point of view can a person or corporation engaged in the movement of oil by pipe lines "be considered and held to be" a common carrier by any authority, judicial or administrative, unless it actually is a common carrier; and such a holding is, I submit, necessary to bring a pipe line within the Act.

II. If Section 7 of the Act is to be construed as applying to all pipe lines, including such as have been used exclusively to transport the oil of their owners, then that part of the Act is unconstitutional.

But the Court, to preserve the Act, will adopt that construction which is consistent with the Constitution, *or which avoids grave constitutional objections.* Hence, the construction contended for is the proper one.

> *U. S.* v. *Del. & Hudson Co.*, 213 U. S. 366, 407-8.
> *Interstate Commerce Commission* v. *Harriman*, 211 U. S. 407, 422.

III. If Section 7 of the Act is to be construed to apply to every corporation which transports its own oil by private pipe line for the purposes of its own business the provisions relating to pipe lines clearly violate the Fifth Amendment of the U. S. Constitution, in that they deprive the owners of private pipe lines of property without due process of law, and take private property for public use without compensation.

> *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324.
> *United States* v. *Lynah*, 188 U. S. 445.
> *United States* v. *Welch*, 217 U. S. 333, 339.
> *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 179.

In *Monongahela Navigation Co.* v. *United States, supra*, Mr. Justice Brewer, at pages 324, 325, said (italics mine):

> "The first ten amendments to the Constitution, adopted, as they were, soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights, the government would

assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as part of one and the same principle.' And in *Gardner* v. *Newburg*, 2 John. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to everyone. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, *it prevents the public from loading upon one individual more than his just share of the burden of government*, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, *in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.* And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v. *United States*, 116 U. S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This

> can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* Their motto should be *obsta principiis.*"

Again, at page 336:

> "Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

The taking for public purposes need not be direct.

In *United States* v. *Lynah, supra,* it was held that land overflowed by water which had backed up from a Government dam was "taken" within the meaning of the Fifth Amendment, and, in *United States* v. *Welch, supra,* the same rule was held to apply to a *private right-of-way* which had been overflowed.

In *Pumpelly* v. *Green Bay Co., supra,* at page 179, Mr. Justice Miller said:

> "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and

> that under the constitutional provisions it is not necessary that the land should be absolutely taken."

It is a taking of property within the constitutional prohibition to appropriate private pipe lines such as are here under consideration, to a public use.

IV. The only pertinent qualifications of the rules laid down in the last foregoing cases are those expressed in the well known elevator and stock yard cases: *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Ratcliffe* v. *Stock Yards*, 74 Kansas 1. It is true that these cases all relate to alleged violations of the Fourteenth Amendment to the Federal Constitution by acts passed by State legislatures; but the principles involved are entirely applicable to the passage of any similar statute by Congress.

The principle upon which all these cases rest is laid down in *Munn* v. *Illinois*, *supra*, at page 126, and the same language is repeated over and over again, not merely in the Federal cases, but in a long line of State decisions, many of which are referred to in the opinion of the U. S. Supreme Court in *Budd* v. *New York*, *supra*. This language is as follows (italics partly mine):

> "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that, when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law

> Tracts 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. *When, therefore, one devotes his property to a use in which the public has an interest*, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

It appears from the further discussion in the opinion in *Munn* v. *Illinois* and in the opinions in the other cases cited above, as well as in the State cases referred to, that, by the words "use in which the public has an interest," the courts mean the use of the property in question for the service of the public, or at least for a section thereof. In no reported case, so far as I am aware, has the doctrine of *Munn* v. *Illinois* been applied unless the property has, at the time when the suit was brought, been actually in such use.

In *Brass* v. *North Dakota*, *supra*, the Court was considering an Act of the Legislature of the State of North Dakota, which provided in part as follows:

> "All buildings, elevators, or warehouses in this state, erected and operated, or which may hereafter be erected and operated, by any person or persons, association, co-partnership, corporation or trust, for the purpose of buying, selling, storing, shipping or handling grain for profit, are hereby declared to be public warehouses, etc."

Referring to this statute, Mr. Justice Shiras, at page 404, says:

> "We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit."

The language of the North Dakota statute above quoted is very similar to that of Section 7 of the Interstate Commerce Act quoted above, and the language quoted from the opinion would seem to be a strong authority in support of the contention that the Interstate Commerce Act does not cover private pipe lines.

So in *Munn* v. *Illinois*, at p. 133, Mr. Chief Justice Waite said (italics mine):

> "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations *if they use it in this particular manner.*"

Quite recently the United States Supreme Court has held that private wharves on navigable streams cannot be taken without compensation, and that to compel the owners thereof to allow the wharves to be used by others would be to take property without due process of law. In this connection, the court distinguishes *Munn* v. *Illinois*.

> *Weems Steamboat Co.* v. *People's Co.*, 214 U. S. 345.

In the case last cited, at pages 355-7, Mr. Justice Peckham said (italics mine):

> "A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use, due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by anyone else.
>
> The case of *Munn* v. *Illinois*, 94 U. S. 113, 127, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. *Their property was being used with their consent by and its use devoted to the public to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done.* The complaint was that the charges were too great and were a violation of a law of the State and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. *The court said, as you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use* and the right, on the part of the State, to regulate charges which you shall make, to the end that they shall be just and reasonable. *If the owner of one of these wharves had devoted it to the public use and permitted the public to use it as it desired, and demanded compensation for such*

> *use, the question as to the amount of such compensation might be raised as in the Munn class of cases,* to be determined with reference to the reasonableness of the charge. But this is no such case. The legislature has passed no law regarding rates, if that were material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it or *because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use.* There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held."

A private pipe line, built by a business corporation and operated for the transportation of its own oil, so far as the rights of its owner are concerned, differs in no respect from a private wharf such as was under consideration in the case last cited.

V. The Act contains no definition of the words "common carrier," except that they shall include express companies and sleeping car companies. Whether a pipe line company in 1910 was in fact a common carrier or not must, therefore, be determined by the common law definition of those words.

Judson on Interstate Commerce, 2d Edition, p. 220, says:

> "The application of the provisions of the Act to pipe lines was made by the amendment of 1906. Owners of pipe lines had been held to

> be common carriers when doing business for the public as such. *Griffin* v. *Pipe Lines*, 172 Pa. 580. * * * As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act. * * * The Act does not define what will necessarily constitute a person or a corporation a common carrier, nor does it empower the Commission to lay down the tests. It follows that the expression 'common carriers' used by Congress means those carriers which are common carriers at common law, and which have complied with such requirements as may have been imposed by constitutional or legislative authority."

The Commission has also so held, at least as to railroads.

In *Manufacturers' Railway Co.* v. *St. L., I. M. & S. Railway Co.*, 21 I. C. C. R. 304 (1911), Mr. Commissioner Clements said, at page 312 (italics mine):

> *"The Act to Regulate Commerce, limiting its application, as it does, to common carriers, was passed in full view and recognition of the common law under which the attitude and actions of the person, whether natural or artificial, determines whether or not he or it is in law a common carrier.* Speaking in general terms, a carrier could become a common carrier by offering its services as such to the public upon first complying with the statutory or police requirement demanded of it by charter or otherwise. *The test to be applied in determining whether a person is a common carrier really is whether he holds out, either expressly or by a course of conduct, that he will, so long as he has room, carry for hire the goods of every person* indifferently who will bring goods to him to be carried. *Nugent* v. *Smith*, 1 C. P. Division 19, 27. With respect

> to the transportation of persons and property by rail, the act to regulate commerce has not undertaken to specify in terms what shall, for the purpose of that statute, be considered to be a common carrier, but has proceeded upon the foundation of the common law as to public callings. It is not therefore within the authority of the Commission to pronounce any carrier by rail not to be in fact or in law a common carrier, if, by the tests and principles of the common law, coupled with such requirements as may have been imposed by constitutional or legislative authority, it would be held to be such."

At common law, the words "common carrier" were limited to one who undertook or held himself out to carry for all persons who wished to engage him.

1. Such is the law of England.

In *Ingate* v. *Christie*, 3 Car. & K. 61 (1850), which is a leading case, Baron Alderson said:

> "Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but, if he does not do it for everyone, but carries for you and me only, that is a matter of special contract."

Gisbourn v. *Hurst*, 1 Salk. 249, defines a common carrier as

> "any man undertaking for hire to carry the goods of all persons indifferently."

In *Nugent* v. *Smith, L. R.*, 1 C. P. 19, at p. 27, Brett, J., said:

> "The real test whether a man is a common carrier, whether by land or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried."

2. In the United States the test is practically the same as in England.

In *Jackson Architectural Iron Works* v. *Hurlbut*, 158 N. Y. 34, Judge O'Brien defines a common carrier at page 38 as follows:

> "A common carrier is one who, by virtue of his calling, undertakes for compensation to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier."

In *Allen* v. *Sackrider*, 37 N. Y. 341, the Court of Appeals said, at page 342:

> "The employment of a common carrier is a public one, and he assumes a public duty and is bound to receive and carry the goods of anyone who offers. 'On the whole,' says Professor Parsons, 'it seems to be clear that no one can be

> considered as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him."

Mr. Moore, in his work on Carriers, says, at page 20:

> "According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for anyone in the course of his employment and for a reasonable and customary price, he would be liable to an action."

This definition was quoted with approval by the Circuit Court of Appeals in the Second Circuit, in *The Wildenfels*, 161 Fed. 864.

In *United States* v. *Sioux City Stock Yards*, 162 Fed. 556, a common carrier of personal property is defined to be

> "one who undertakes for hire to transport from place to place the goods of others who may choose to employ him for that purpose."

3. Obviously, The Uncle Sam Oil Company does not come even remotely under any of the definitions of a "common carrier" thus laid down.

Second: Companies organized under business corporation laws, and which profess to do and are actually doing only a private business, even if it be a transportation business, are not subject to regulation under the Interstate Commerce Act. Such companies lack the essential characteristics of a holding out to the public for general services.

I. It has been held in numerous cases that industrial railroads, built for the transaction of private business, are not subject to liability as common carriers.

Wade v. *Lutcher & M. Lumber Co.*, 74 Fed. 517 (C. C. A., 5th Circuit, 1896).
E. E. Taenzer & Co. v. *C., R. I. & P. Ry. Co.*, 170 Fed. 240, 248, 249 (C. C. A., 6th Circuit, 1909).
Weidenfeld v. *Sugar Run R. R. Co.*, 48 Fed. 615, 617, 618.
McKivergan v. *Lumber Co.*, 124 Wis. 60.

In *Wade* v. *Lumber Co.*, *supra*, at page 521, the Circuit Court of Appeals for the Fifth Circuit said:

> "But for the earnestness with which the argument was presented in this court, we would not suppose that the learned counsel would seriously contend that Article 244 of the State Constitution, dealing with corporations of public improvement and public utility, was intended to or could be so construed as to make out of a logging railroad appurtenant to a sawmill, constructed wholly on private ground and operated for private purposes, a common carrier, charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold

that a railroad on a sugar plantation, appurtenant to the sugar mill and used for carrying the cane thereto, should be declared a common carrier. The Supreme Court of the State of Louisiana, while not squarely deciding the matter in hand, has decided that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from one another, and which, it was charged, was not a corporation organized for public purposes, but was a combination of individuals, whose sole object was to foster private ends of two certain persons named, who owned jointly two sugar plantations and who wished to transport the sugar cane grown on one of the plantations to the refinery situated on the other, was not *ex necessitate* such a corporation for public improvement as would authorize the appropriation of private property for its purposes. *Williams* v. *Judge of the Eighteenth Judicial Court*, 45 La. Ann. 1295, 14 South. 57. The proposition that an individual may build a railroad wholly on its own land, for its own business without making the same a common carrier, we do not doubt."

In *Taenzer & Co.* v. *Chicago, R. I. & P. R'way Co.*, *supra*, the Circuit Court of Appeals for the Sixth Circuit held that a spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill, some miles distant, for the purpose of transporting its own products to the railroad for shipment, and which neither did nor held itself out to do carrying for the public, was not a common carrier. The court said, at pages 248-9:

"The chief arguments adduced in favor of the proposition that the so-called St. Francis River Railroad is a common carrier are that

the term 'railroad,' as contained in the name under which the road was operated, imports the status of common carrier; that the provisions in the contract for joint construction and maintenance of passenger and freight depot buildings and platforms (including joint station agent), and references therein to the lumber company's line as a 'railroad' and to its 'right-of-way'; the provisions for division of freight rates, as between two connecting carriers, and the including in the agreement for rates and division thereof, shipments of cotton and merchandise, are consistent only with the status of the St. Francis River Railroad as a common carrier. But these considerations cannot outweigh the substantial considerations shown, not only by the contract, but by the conditions and circumstances under which it is shown to have been made. They cannot overcome the fact which clearly stands out, according to the proofs given or offered, that the so-called railroad was intended, both by the railroad company and the lumber company, merely as a spur to the mill, for the purpose of enabling the lumber company, not as a carrier, but as a shipper, to transport its forest products over the line of the Choctaw road; that throughout the lumber company's relation to the railroad company was in fact that of a shipper—a relation emphasized by the requirement that the lumber company ship 'its products over the Choctaw railroad, unless transported by river.' The terms used and the provisions relied upon as establishing the status of common carrier cannot prevail against the considerations that this lumber and logging road had no rolling stock suitable for any purpose except logging; that there was in the neighborhood no cotton or other merchandise to ship, and no inhabitants to serve as carrier, either in the relation of passengers, shippers or consignees; and that there was no holding out of the road as such carrier by advertisement or otherwise.

> * * * *A private railroad, established as an incident to a private business, is not a common carrier.*"

II. The same view is expressed concerning pipe lines under the Interstate Commerce Act, by Judson on Interstate Commerce, 2d Edition, at page 220:

> "As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act."

Third: Even companies organized under transportation laws which grant the right of eminent domain and common carrier franchises and impose public duties are not necessarily common carriers within the meaning of the Interstate Commerce Act unless actually operating as such.

I. From the point of view of the State granting a charter which confers the right of eminent domain and common carrier franchises, or otherwise specifically provides for public service to be rendered under it, the acceptance by such corporation of such charter undoubtedly amounts to an undertaking by such corporation to serve all, and subjects the corporation to the duties of a common carrier.

Griffin v. *Southwest Penn. Pipe Lines*, 172 Pa. State 580.
People v. *Colorado Central Railroad Co.*, 42 Fed. 638, at p. 642.
Cincinnati, I. & W. Ry. v. *Connorsville*, 170 Ind. 316.

II. But it by no means follows that such companies are within the provisions of the Interstate Commerce Act.

The purpose of the Act should be borne in mind. Its underlying principle was to secure reasonable rates, to prevent discriminations against shippers and localities, and publicity of rates. *Interstate Commerce Com.* v. *B. & O. R. R. Co.*, 145 U. S. 263; *N. H. R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361. From this point of view it is concerned only with those carriers which *are actually serving* two or more possible competitors or the public generally.

This view has been accepted by the Interstate Commerce Commission itself. In *Star Grain & Lumber Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 17 I. C. C. R. 338 (1909), Mr. Commissioner Harlan said, at page 344 (italics mine):

> "It is sometimes said that the essential characteristic of a common carrier is that it holds itself out as such to the world, and, in a certain class of cases, some such test has been applied; and where there is a shipping world to which it may hold itself out as a common carrier and which it may serve in that capacity, the test suggested may be a proper one. But when we are dealing with a law, the underlying principle of which is to forbid preferences, discriminations and concessions from the legal rates, and when there is no shipping public which the alleged common carrier may serve, and when it is owned or controlled directly or indirectly by a particular industry which needs it as a plant facility and cannot successfully conduct its business without it, and when its revenues accrue directly or indirectly to that industry—it leaves this Commission in rather an impotent condition if it must accept the mere

form as controlling, and may not look into the actual situation and thus be able to enforce the prohibitions of the Act against such preferences and discriminations and departures from lawfully published rates. Some such state of facts was developed in *Taenzer & Co.* v. *C., R. I. & P. Ry. Co.*, 170 Fed. Rep. 240. Shortly before that proceeding was commenced *the logging road in behalf of which the case was instituted was incorporated as a common carrier*, so that it stood before the court with all the outward form of a common carrier possessed by the great majority of the so-called tap lines that are now before us on this record. * * * Upon these facts the court had no difficulty in holding that the tap line 'was not a common carrier.' "

The Commissioner continued, at page 352:

"The difficulty of determining where the private carrier leaves off and where the common carrier begins is what lends embarrassment to the problem before us. Manifestly, a lumber company cannot endue its railroad with the habiliments of a common carrier by taking out an act of incorporation, nor by the filing of a tariff, nor by the making of a statistical report to this Commission. The fact that the Legislature of the state has granted an act of incorporation with the right of eminent domain, especially if that right has been exercised in the construction of the road, would be significant; *but, after all, it is in each case a question of fact, depending upon the circumstances under which the individual road has been constructed and is being operated.*"

See, also, *Weidenfeld* v. *Sugar Run R. R. Co.*, 48 Fed. 615, 617-18.

There is, therefore, a clear distinction between the powers of the State which creates such a cor-

poration and the powers of the Interstate Commerce Commission as limited by this Act. In its relation to the State the corporation is clothed with a public interest and subject to regulation, because its charter so provides. If it refuses to perform the duties which it has undertaken its charter may be enforced or revoked, or other penalty imposed. But the Interstate Commerce Commission is given no such power. It has jurisdiction *only if the corporation is actually doing the business of a common carrier in interstate commerce.* It then regulates and controls such business; but it has no power to enforce the charter undertakings of a corporation, or to compel it to act as a common carrier if it is not doing so.

Fourth. The transactions of appellee are interstate transactions, but are not interstate commerce, as they do not constitute or involve any dealings between appellee and another. The Constitution does not give the Congress authority to regulate interstate transactions which do not amount to commerce and if the act should be construed to apply to the transactions of appellee it would be unconstitutional.

The fact that appellee produces and pumps its oil through its 3-inch pipe line from its oil wells in Oklahoma to its refinery in Kansas, does not show that it is engaged in the transportation of oil in *interstate commerce.* All acts performed by its employees are performed by it—their acts are its acts, and hence there is no dealing between appellee and another. Congress is granted the power to regulate interstate *commerce.* That does not include the

power to regulate interstate transactions *which do not amount to commerce.* The word *commerce* is a well-known term. It is absurd to say that a transaction which involves no dealing with others is commerce. Commerce means dealing between two or more persons, and there is no commerce or dealing between The Uncle Sam Oil Company and any other person, in the transaction by which it produces the oil at the wells in Oklahoma and transports it through its 3-inch pipe line from the oil wells in Oklahoma to its refinery at Cherryvale, Kansas. This transaction is one entirely within the company. No other person is concerned with it, and there is no semblance of commerce in it. The transaction is precisely the same as the transaction of a farmer who owns land crossed by the state line between Oklahoma and Kansas and who drills an oil well on his own land in Oklahoma and pipes his oil across the state line to his tank on his own land in Kansas. It would be absurd to say that he is a common carrier and that by such transaction he is engaged in interstate *commerce* and could be compelled to transport oil for the public through his line, or else to cease piping his own oil, nor would the fact that his pipe line crossed the public highway make him a common carrier.

In construing the law and in ascertaining its true meaning we should constantly bear in mind that not only the President, but each member of the Congress, has taken an oath to *support* the Constitution, and that they never intended to violate that oath by passing a law which would *violate* the Constitution. The Constitution is a compact between the people as a whole on the one part and each individual on the

other part, and it is supreme. Whenever any law is in conflict with the Constitution the law is void. The Constitution does not give the Congress the power to regulate interstate transactions of an individual or corporation which consist of transporting a commodity from a point in one state to a point in another state and delivering the commodity to itself, for there is no *dealing* in the transaction. It does not amount to commerce. Interstate *commerce* is all that Congress can regulate.

> Constitution, Article 1, Section 8.
> 8 Federal Statute An., page 363, and cases there cited.

Commerce is defined by Webster's Universal Dictionary as follows:

> "1st. In a general sense, an interchange of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale, trade, traffic. 2d. Intercourse between individuals, interchange of work, business, civilities, or amusements; mutual dealings in common life. The word is synonymous with barter, business, communication, dealing, exchange, intercourse, trade, traffic."

> "Commerce among the states consists of *intercourse and traffic between their citizens.*"
> *Gloucester Ferry Co.* v. *Penn.*, 114 U. S. 203.
> *Addyston Pipe, etc., Co.* v. *U. S.*, 175 U. S. 241.

"*Intercourse*" and "*traffic*" "*between*" citizens. There is no intercourse or traffic between citizens in the transactions of The Uncle Sam Oil Company

whereby it transports its own oil through its three-inch pipe line from its oil wells near Bartlesville, Oklahoma, to its own refinery at Cherryvale, Kansas. It is purely a private transaction of the Company in which no one else is interested or participates and it does not amount to intercourse or traffic between the Company and any other person; therefore it does not amount to commerce and cannot be regulated by Congress without an amendment of the Constitution.

The Uncle Sam Oil Company has the legal and constitutional right to transport its oil through its own pipe line from its oil wells near Bartlesville, Oklahoma, to its refinery at Cherryvale without any interference by others. It has the *right to refuse to transport oil* through its pipe line for others. This *right to refuse* to work for others and *furnish the use of its property to others* is *property* within the meaning of the Constitution, and it cannot be taken from the Company by Congress without due process of law.

Constitution, 5th Amendment.

The Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument.

U. S. v. *Germaine*, 99 U. S. 510, 9 Federal Statutes An. 219.

Mr. Webster, in *Dartmouth College* v. *Woodward*, 4th Wheat. (U. S.) 518, defined due process of law thus:

> "By the law of the land, which is but another expression for due process of law, is most clearly indicated the general law—a law which

hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or to administer the justice of the country."

10 Am. & English Encv. of Law, 2d Edition 293, and cases there cited.

Justice Johnson, in the case of *Columbia Bank* v. *Okely*, 4 Wheaton (U. S.) 235, defines the clause due process of law, as being intended to secure the individual from the *arbitrary* exercise of the power of government *unrestrained by the established principles of private right* and distributive justice.

Hoover v. *McChestney*, 81 Federal Reports 48.

Meyers v. *Shields*, 61 Federal Reports 718.

If it is true that Congress has no power to regulate a private transaction which possesses none of

the elements of commerce, then, of course, the rule of reason would interpret the law to read that the Act should apply only to persons engaged in the transportation of oil *for others*. That is evidently what Congress intended, for the entire Act is taken up with regulations of the conduct of the transportation company with those employing it to transport and handle their commodities.

A common carrier is one who undertakes, for hire or reward, to transport from place to place the goods of those who choose to employ him, and his duties and liabilities are well settled in the law. See Am. & English Ency., 2d Edition, 237, 245.

Under the common law and where there is no special contract affecting the rights and duties of the parties, a common carrier is liable absolutely and at all events for a failure to deliver the property intrusted to it safely to the consignee or owner. Its liability is not limited to losses which are the result of its negligence, but extends to any loss however caused, excepting only those losses or injuries caused by an act of God, or the public enemy, or through the shipper's negligence.

> 6 American & English Ency. of Law 262, 263, and cases there cited.

How is it possible for any law-abiding citizen to contend that The Uncle Sam Oil Company shall be compelled to receive and transport through its 3-inch pipe line all the oils which others may offer, and that it shall be compelled to take said oil and assume the absolute liability of delivering it to the consignee or owner, notwithstanding the transportation of this

oil for others would suspend the operation of its refinery for lack of ability to transport its own oil to its refinery? How can it be claimed that this liability and injury could be forced upon The Uncle Sam Oil Company when it has never offered to transport any oil for any person and has never transported oil for any person? If the duties and obligations of a common carrier can be imposed upon The Uncle Sam Oil Company under these conditions, then they can be imposed upon every farmer in the United States who hauls his grain and products from his farm to market. The public highways are for the use of the public. The Uncle Sam Oil Company is a part of the public, and it has as much right to use the public highway to transport its oil in a pipe line as it would have to transport its oil in a wagon drawn by oxen.

State v. *Kansas Natural Gas Co.*, 80 Pac. 962, 71 Kan. 508, 114 Am. State Rep. 507.
La Harpe v. *Gas Co.*, 69 Kan. 97, 76 Pac. 448.
McCann v. *Telephone Co.*, 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171.

It would be absurd to claim that because it transports its oil over the public highway in a tank wagon drawn by an ox team, that it therefore became a common carrier of oil and was obliged to carry all the oil offered it, and insure the safe delivery of such oil under all circumstances. I realize that this is an age in which many innovations are proposed. I am expecting to see some candidate for the presidency propose an amendment to the multiplication table, a repeal of the Ten Commandments and of the law of

gravitation, but if the Constitution is to be of any validity or value to the plain common people, no such proceeding as declaring The Uncle Sam Oil Company a common carrier, and burdening it with the duties and obligations of a common carrier, to the injury of its own business, will be countenanced by this Court. The only argument in favor of such outrage is the plea that someone else may have oil to transport and no pipe line in which to transport it. With equal force our refineries could be declared common refineries; our tank cars common tank cars; our distributing stations common distributing stations, and our tank wagons common tank wagons, and all turned over to the use of those who had oil to refine, transport and distribute, but no refineries, tank cars, distributing stations or tank wagons. If that plea should warrant the confiscation of our property and the injury of our business, which would be caused by compelling us to assume the duties and obligations of a common carrier, then the same rule would make a common carrier out of the farmer who owns a team and transports his farm products from his farm to market, provided there should be another farmer who had products to transport, but no team.

Appellants lay much stress upon the debates in Congress and the reports of departmental agents showing a desire on the part of a large element of the people to have oil pipe line companies declared common carriers. Senators and Congressmen and Departmental Agents may come and go, as many of them have, but the Constitution remains. It cannot be violated if our liberties are to be preserved. Even if all of the Senators, Congressmen and Departmental Agents were in favor of violating the Constitution

their acts to that end would be void. The court would be bound to declare the truth and the truth would make their acts of no effect. The position of appellants that the intention of Congress should prevail amounts to an argument in favor of rendering the Constitution of no force or effect. If the Constitution can be changed at the will of Congress, then the Constitution is a mere dream which can be dissipated by any act of Congress and we would be substituting a government by men instead of our present government by written law. The Constitution provides how it may be changed by amendment. The people have a right to change the Constitution by amendment, but even all of the people have no right to take our property without compensation so long as the Constitution remains in its present form.

Congress recognized the law which classifies carriers into two classes, common carriers and those not common, and it has undertaken to place the burden of common carriers upon every pipe line company which carries any oil *for others* from one state to another. Evidently this is undertaken by the Congress for the purpose of preventing the owner of such pipe line from discriminating in favor of certain favored shippers, and I am not contending that Congress does not have the power to do this. It seems but fair to require a company which transports oil from one state to another for one person to also transport the same kind of oil for others at the same rate and under the same terms and conditions. This may be undertaken by the Act in question. When a company transports oil from one state to another for one person, even under a special contract, the transportation is interstate commerce, and the Congress

may have the constitutional right to say to the transporting company: "If you engage in such interstate commerce with one person you must also do likewise with others." This seems just. But where the transaction of the company is a mere transporting of its own oil from one point to another to itself, and *there is no dealing with another involved,* it is not *commerce.* It is not interstate commerce, and the Congress cannot, on account of such transaction, burden the company with the obligations and duties of a common carrier. The fact that The Uncle Sam Oil Company intends to refine and sell its oil after it reaches Cherryvale cannot make transportation of it from its wells near Bartlesville to its refinery at Cherryvale, interstate commerce. If that was the law, then if a farmer in one state *intended* to haul his products to a market across the state line and sell them there, his intentions to sell at that market would make his work of raising and hauling the crop interstate commerce. The law must be uniform and bear upon all alike. If the work of the farmer in raising and hauling his crop to market would not be interstate commerce until he should *actually sell and agree to deliver his product to another* across the state line, it is clear that the same rule would not make the transportation by The Uncle Sam Oil Company of its oil from its oil wells in Oklahoma to itself in Kansas, interstate commerce. It would not be interstate commerce unless the company had sold its oil in Oklahoma and agreed to deliver it in Kansas. This it has never done.

If The Uncle Sam Oil Company can be declared a common carrier, its rich and powerful competitor could easily manage to have oil enough tendered for

shipment to equal the capacity of the line and thereby prevent The Uncle Sam Oil Company from transporting to its refinery any of its own oil, and in this manner it could close a competing refinery. This is not in the interest of competition. It is not for the best interest of the people. I submit that the best interests of the people will best be subserved by strict adherence to the Constitution. It has protected the people by preserving their rights these many years, and it should not be violated in this instance. It is easy to start a conflagration, but not so easy sometimes to put it out. It may seem easy to pile these illegal burdens upon The Uncle Sam Oil Company, but if the Constitution can be violated in this instance, who will say it may not be violated in every other instance, and whose rights will be safe? This should be as it was intended, a government of law, not of men, and until the Constitution is legally amended, so as to authorize Congress to provide that everyone owning a pipe line shall be a common carrier, whether he offers to carry for the public or not, it should be held that there is no law making The Uncle Sam Oil Company a common carrier under the circumstances set forth.

Fifth: The laws of the State of Kansas and the State of Oklahoma, undertaking to make the owners of pipe lines, under certain conditions, common carriers, do not have that effect as to appellee.

For the reasons set forth herein, no state has the power to convert the owner of a private pipe line into a common carrier without the consent of the owner, unless the owner has held himself out as will-

ing to assume the duties and liabilities of a common carrier. In other words, *unless the pipe line owner dedicates his property to the use of the public.* This has never been done by the appellee, and from the authority cited in this brief the states are without any power or authority to decree by legislative enactment the appellee to be a common carrier and to impose upon it the duties and obligations of a common carrier by legislative enactment without its consent.

As stated in the petition, the pipe line of appellee extends from Bartlesville to Cherryvale, *both points being within the oil field and the market price of the crude oil being the same at each end of the line.* This fact makes it clearly improbable that any owner of crude oil would desire to have it transported through the pipe line of appellee. Such crude oil owner could get for his crude oil the same price before shipping as he could get after the shipment was made and he would lose the cost of transportation by the operation. No owner of crude oil has yet been discovered who is so lacking in business acumen as to be willing to pay appellee for transporting the oil sixty miles when he could secure the same market price without making the shipment. *This fact accounts for the fact that since the pipe line of appellee was constructed in 1906 no person has tendered any oil for shipment.*

The law in Oklahoma referred to in the answers was passed after said pipe line was laid and in operation in accordance with the rights granted by Congress and the Territory of Oklahoma. It clearly refers and applies to common carriers, but does not apply to the pipe line of appellee.

Sixth: The public policy of the United States or of any state therein cannot be created in violation of the Constitution.

The answers and briefs of appellants are largely devoted to statements attempting to show the court that a law which would require a pipe line to be a common carrier might be beneficial to a certain class of people, and that it is practical for a pipe line to accept a certain grade of oil from the shipper and deliver a like quantity of a like grade of oil at the place of destination. Counsel for appellants may be correct in these conclusions, but I apprehend that this Court will not undertake to enter upon the creation of such legislation when Congress has not even attempted it. Congress has not undertaken to say in terms that appellee must build storage tanks for the various grades of oil and must receive the various grades of oil and trade therefor the same amount and grade of oil at the place of destination plus a reasonable charge for the services. It is left for the ingenuity of counsel to suggest that appellee might engage in the business of a warehouseman and trade oil with the public. The duty of a common carrier is to deliver the identical property tendered for shipment to the consignee or owner at the place of destination. It may be argued that grain is exchanged in the course of shipment. If this occurs it occurs by contract and the contract makes the carrier, so far as the exchange is concerned, a warehouseman Congress has not undertaken to declare pipe line companies warehousemen. Counsel for respondent surely cannot go to the extent of claiming that Congress by the Act declared or undertook to declare

that pipe lines companies are warehousemen. And even had it so intended to declare the public policy, it could not so violate the Constitution.

Seventh: Appellee has no power to construct or operate a pipe line as a common carrier.

By reference to the laws of Arizona at the date of its incorporation, I think the Court must find and hold that appellee was organized as a private mining and manufacturing company. Section 21 of the Corporation Laws of Arizona at the date of the incorporation of appellee provides that "No corporation organized under the provisions of this Act for the purpose of doing a mining or manufacturing business shall have the power to construct or operate any railroad, tramway, turnpike or canal, except such as may lead from its principal works or place of business to some navigable stream or to some existing railroad, turnpike or public highway."

While the word pipe line is not used in said section, yet the fair intent of the Legislature clearly appears to be to withhold from any company organized for mining and manufacturing purposes the power to construct or operate any means for the transportation of persons or property as a common carrier. The Legislature provides for the organization, operation and control of railroads and other common carriers by separate enactments. It seems to me there can be no question but that under the law of its organization appellee is a private mining and manufacturing company and that the power and authority to act as a common carrier was withheld from it.

Eighth: The acceptance of a right-of-way from the Interior Department does not make the appellee a common carrier.

The answers of the United States and of the Interstate Commerce Commission both state that appellee made application for a right-of-way over Indian lands subsequent to December 21, 1906. They distinctly state that the application was made under the rules and regulations of the Interior Department, dated December 21, 1906, and that appellee in its application for said right-of-way and in accepting the same agreed that the pipe line should be a common carrier and that said application was approved by the Secretary of the Interior after December 21, 1906, and under said rules which required the applicant for right-of-way to agree that the pipe line to be laid should be a common carrier. These positive statement in the answers are sworn to by the persons who verified the answers. I do not question the sincerity and honesty of purpose of the persons who verified the answers. I am informed by an attorney for the Interstate Commerce Commission that this false information was furnished by some person in the Interior Department and I believe that someone in the Interior Department deliberately deceived counsel for the United States and for the Interstate Commerce Commission and the Honorable Charles A. Prouty, the Commissioner who verified the answer of the Interstate Commerce Commission, and misled them to believe that the records showed that the application for the right-of-way for this pipe line had been made subsequent to December 21, 1906, and that appellee made the application under said rules and

regulations of December 21, 1906, and agreed that the pipe line should be a common carrier. The record discloses the falsity of such statement and the desperation to which the Interior Department seems to be driven in its opposition to appellee. The extortionate demand by the railroad company, which had upon its board of directors the late H. H. Rogers, managing officer of the Standard Oil Company, forced appellee to build this pipe line to move its oil from its wells to its refinery to avoid paying said railroad more than the market value of the oil for transporting it sixty miles in appellee's own tank cars. Now the Interior Department furnishes the Interstate Commerce Commission the false statement that said pipe line was laid upon right of way obtained by an agreement that it should be a common carrier, to induce the Interstate Commerce Commission to take that position and the Honorable Charles A. Prouty and the Honorable Blackburn Esterline to swear that such misstatement is the truth. On this decree of the Interstate Commerce Commission, based upon this false information furnished by the Interior Department, the Interior Department has refused to approve any lease for oil or gas purposes made by the Indians to appellee and stated to Congressmen, Senators and the public generally that it disapproved the lease because the Interstate Commerce Commission had declared appellee a common carrier. The Interior Department in this matter stands in no enviable position. It is no excuse to say that the statement was made because a map was returned to the Department January 1, 1907, and approved January 23, 1907. The record shows that this map was in the Department prior to December 5, 1906, and

that the application for the right-of-way was made in February and approved in March, 1906; that this map, which is but a picture of the right-of-way applied for and granted on March 26, 1906, was merely completed by attaching thereto the surveyor's notes to make it more plain and clear; that said map did not change the right-of-way, and that in approving said map the then First Assistant Secretary of the Interior, the Honorable Thos. Ryan, distinctly stated that the application for the right-of-way had been approved March 26, 1906. The record shows that the pipe line was completed and in full operation November 16, 1906, and the completion of the map could not change the rights of the Company to the right-of-way for said pipe line any more than a photograph of the line could do so. There is nothing on record showing that the appellee ever knew of the rules of December 21, 1906, and affidavits from its officers prove that it had no knowledge or notice of such rules. Under these conditions there could be no estoppel of the appellee to claim that said pipe line is not a common carrier.

The rules and regulations of the Interior Department, dated December 21, 1906, requiring applicants for right-of-way to agree that the pipe line should be a common carrier, were repealed by the Interior Department June 10, 1909, and even if said rules had been legal and authorized by Congress, the repeal would relieve appellee from complying with their terms. But the provisions of the rules of December 21, 1906, which require applicants for right-of-way for pipe lines over Indian lands to agree that such pipe lines shall be common carriers, are not authorized by law. They are a usurpation of author-

ity by the Interior Department and were an attempt on the part of the then Secretary of the Interior to enact a law on the subject when Congress, the law-making body, had not done so. The law under which said rules were made was the Act of March 11, 1904, entitled "An Act authorizing the Secretary of the Interior to grant right-of-way for pipe lines through Indian lands." The Act gives the Secretary of the Interior authority to determine the compensation to be paid the Indians for the right of way. That is the extent of his authority as to imposing terms for the right-of-way granted. It gives no authority to the Secretary of the Interior to manage the operation of the pipe line. Any attempt of the Secretary of the Interior to conduct or manage the pipe line would be a usurpation of authority, and any rule made by him, not authorized by law and not incidental to carrying out the provisions of the law, are void, notwithstanding parties dealing with the Department have been compelled to incorporate such void rules and requirements into a written contract.

U. S. v. *McMurray*, 181 Fed. 723.

See also:

Garfield v. *U. S.*, 211 U. S 249, 29 S. Ct. 62, 53 U. S. (L. Ed.) 168, affirming 30 App. Cases 177.

In the above case of *U. S.* v. *McMurray*, regulations by the Secretary of the Interior which require lessees of coal and asphalt lands to mine on each lease 3,000 tons the first year, 4,000 tons the second, 7,000 tons the third, 8,000 tons the fourth and 15,000 tons the fifth and each succeeding year or pay the

royalties on such quantity if not mined, and prescribing that a failure to do so would subject the lease to cancellation, were held to be void. There is some slight excuse for the Secretary to make these requirements as to the quantity of coal to be mined, because it might be thought to be incidental to his authority conferred by Congress, but there is no reason upon which to base the action of the Secretary of the Interior undertaking to force applicants for the right-of-way authorized by Congress to accept the burdens, duties and obligations of a common carrier.

In the case of *Midland Oil Company et al.* v. *Susan Turner et al.*, decided by the Circuit Court of Appeals April 11, 1910, 179 Fed. 74, the question of the Secretary's power to change by rule or regulation the terms of an existing lease was involved and the power denied. The lease was made under rules and regulations prescribed by the Secretary of the Interior and subject to his approval. It provided that it should not be assigned without the written consent of the lessor. Subsequently new rules were promulgated providing for assignment of such leases upon the consent of the Secretary of the Interior. The assignment of the lease was made without the consent of the lessor, but with the consent of the Secretary of the Interior. The assignment was held to be void.

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted.
>
> *Morrill* v. *Jones*, 106 U. S. 466, 1 Supreme Court 423, 27 L. Ed. 267."

The acceptance of such terms under such conditions would not be valid and binding upon appellee. And in event that it should be held to be a valid rule, it has never been complied with, and the real test as to whether appellee is a common carrier must be determined by the manner of operating said pipe line.

The record shows that appellee was forced by extortionate freight rates to build this line; that the line extends from one point to another wholly within the oil field; that the price of crude oil has remained the same at both ends of this line; that during the six years it has operated the line solely in the movement of its own oil from the wells to its refineries, no person has tendered any oil for shipment; that there is no element of commerce in the operation of said pipe line; that the Interstate Commerce Commission by said order is seeking to compel appellee to become a common carrier and to assume all of the duties and liabilities not only of a common carrier but of a warehouseman in violation of its rights under the Constitution, and that said Commission will carry out said order and violate the rights of appellee unless it is enjoined. Therefore the temporary injunction asked for should have been granted, and there is no error in the decision of the lower court granting the protection due appellee under the Constitution.

Respectfully submitted,

ALBERT L. WILSON,
Solicitor for Appellee.

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THE PIPE LINE CASES.

No. 508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

United States of America, Interstate Commerce Commission, and Wellsville Refining Company, *Appellants*,

v.

Robert D. Benson, William S. Benson, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, Jr., Henry C. Folger, Jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McKelvey, of Titusville, Pennsylvania, Partners doing business under the partnership name of the Tide Water Pipe Company, Limited.

Appeal from the United States Commerce Court.

BRIEF ON BEHALF OF APPELLEES.

W. I. LEWIS,
ARCHIBALD F. JONES,
R. R. LEWIS,
Solicitors for Appellees.

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THE PIPE LINE CASES.

No. 508.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

United States of America, Interstate Commerce Commission, and Wellsville Refinng Company, Appellants.

vs.

Robert D. Benson, William S. Benson, of Passaic, New Jersey; Dickson Q. Brown, George F. Baker, Jr., Henry C. Folger, Jr., of New York City, New York; Oscar L. Hascy, of Albany, New York; Robert McElvey, of Titusville, Pennsylvania, Partners doing business under the partnership name of The Tide-Water Pipe Company, Limited.

APPEAL FROM COMMERCE COURT

BRIEF ON BEHALF OF THE APPELLEES

Questions Involved.

The act to regulate commerce, as amended June 29th, 1906, Section 1, provides:

> "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity * * * * * by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any carrier or carriers engaged in the transportation of passengers or property * * * * * from one state or territory of the United States, etc."

In the court below two questions were raised and decided:

First: The appellees maintained that the words "who shall be considered and held" are words of limitation and that the act did not apply to private persons engaged only in conveying their own oil through their private pipe line, and that the act as a whole regulates common carriers and was not intended to regulate private business. The Interstate Commerce Commission contended, and the Court held, that the act defined and created

common carriers of all pipe lines, whether public or private.

Second: The court below held that to give the act the effect claimed by the Commission and intended by Congress operated to deprive the appellees of their private property without just compensation, and, therefore, the Interstate Commerce Commission was enjoined from the attempted enforcement of the act against the appellees.

Statement of Facts.

The facts are not stated fully and accurately in the Appellants' briefs. The facts found by the Court below, on which it based its decree, were briefly:

The appellees are members of a partnership, organized for a limited term in compliance with the laws of the State of Pennsylvania, doing business under the name of The Tide-Water Pipe Company, Limited;

That the business of the appellees consists in transporting their own oil to the Tide Water Oil Company Refinery at Bayonne, New Jersey, the pipe line and Bayonne Refinery being under common or unified control;

That the appellees derive no corporate powers from laws of the state of their organization as common carrier or public service corporation, but the partnership was formed and has always conducted

its operations under and in compliance with the state laws as private business;

That it is not claimed that they are under any statutory or legal obligation, other than the amendment in question, to perform the duties or otherwise act in the capacity of a common carrier;

That they do not possess the right of eminent domain; nor have they acquired any part of their property or rights of way by condemnation; nor have they received any franchise from any state, municipality or local government; nor have they held themselves out as common carriers, or in fact carried oil for others, but have carried only such oil as they produce from their own wells or purchase from other producers and which they owned when the transportation took place;

The pipe lines are laid on private rights of way secured by purchase or lease. In short, so far as their legal status is fixed by the laws of the state of their creation, and, so far as their acts and attitude could make them such, all the petitioners carry on a private business, at least in the sense that they transport only their own oil, and have always refused to transport for others, and all of them have evidently sought and claimed to so conduct their operations as to avoid any public activity which might subject them to public regulation.

One other fact set forth in the petition may be considered important and that is that the pipe line property does not stand alone; it is connected with other business of the appellees; it connects

their oil producing operations with their refinery, the refinery being so located that to deprive the appellees of the private use of their pipe line will also deprive their refinery, in which many millions of dollars are invested, of the necessary crude oil, involving a greater loss to the refinery than the loss of the pipe line alone.

It also appears by affidavit filed in support of motion for preliminary injunction (508; R. 48) that the Tide-Water line has no connection with any other pipe line company and does not in any manner form a through or connecting pipe line.

It also appears from the same affidavit (508; R. 47) that it has been judicially determined that no combination exists between the Standard Oil Company and the Appellees; Standard Oil Company v. United States, 221 U. S., 1; 173 Fed., 177.

ARGUMENT

If the act is given the effect of creating all pipe lines, whether public or private, common carriers, it is unconstitutional, in that it operates to deprive the appellees of their property without due process of law, and to take the same for public use without just compensation.

FIRST: This amendment, as construed by the Government, is an attempt, by legislative declaration or definition, to make a private occupation a public calling and to impose upon private pipe lines

the obligation of common carriers.

This act does not purport to regulate the private business but simply declares the private pipe lines to be common carriers and requires them to comply with all of the provisions of the act regulating interstate commerce, no matter with what resulting damage or injury to the pipe line and with no attempt to provide for compensation for the private right destroyed.

It is not claimed that the act regulates some public use to which private property has been voluntarily devoted, but attempts, by way of definition, to convert this private property into a public instrumentality for public service.

The learned court below is led to propound the following questions:

> "When the principle involved in this amendment is apprehended, when its far reaching scope and power are perceived, does not the reflecting mind almost instinctively reject it as unsound and unjust?
>
> "Is it not at variance with any reasonable conception of the rights and immunities of private property and the conditions under which it may be taken for public use?
>
> "How can the conclusion be avoided that it operates and must operate to deprive the petitioners of their property without due process of law and to take that property wthout just compensation?"

If this act is given the effect claimed by the Government, it declares a public use of private pro-

perty; by way of definition, it converts private property to public service; it deprives the appellees of the use of their private property for their private purposes and compels them to become public servants and operate their pipe line for public benefit without their consent, and this is said to be justified by the commerce clause in the Constitution and is said to be simply a regulation of commerce.

If this be true, then the power of Congress to regulate commerce is subject to no limitation and the right of the citizen to engage in interstate commerce ceases to be an inherent right secured by the Constitution, and becomes a privilege granted or prohibited, as Congress may deem expedient.

Moreover, due process of law is answered by a simple definition promulgated by act of Congress, and just compensation is to be fixed. not for the taking but for the use. Such compensation is not to be based on the value of the property taken, but only for the use of the property of which the citizen is thus deprived. Finally, the citizen is not to be compensated at all, because this statute is police regulation.

SECOND: The power of Congress to regulate Interstate Commerce must be exercised subject to the limitations imposed by the Constitution.

In **Adair v. United States, 208 U. S., 161 (180),** Mr. Justice Harlan says:

"The power to regulate interstate com-

> merce, great and paramount as that power is, cannot be exercised in violation of any fundamental right secured by other provisions of the Constitution."

And Mr. Justice Brewer, in **Monongahela Navigation Company v. United States, 148 U. S., 331 (336)**, says:

> "Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth mendment, and can take only on payment of just compensation."

The commerce clause is not intended to interfere with private rights or to create impediments to intercourse. Congress cannot forbid intercourse: **Railroad Company v. A. W. Richmond, 86 U. S., 584.**

To carry on interstate commerce is not a franchise or privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States: **Crutcher v. Kentucky, 141 U. S., 47.**

It is conceded by the Interstate Commerce Commission and the Government that this assumed power of Congress to declare private property public is novel.

THIRD: When one dedicates his property to public use, that use is subject to public regulation. Munn v. Illinois, 94 U. S., 113.

Budd v. New York, 143 U. S., 517.
Brass v. North Dakota, 153 U. S., 391.

It seems to have been conceded in these cases, and in the frequent references to the cases subsequently, that there was no attempt to compel the owners to grant the public an interest in the property, and that such regulation could not be sanctioned except the owner of the property dedicated it to public use by his voluntary act. Mr. Chief Justice Waite, in **Munn v. Illinois**, says:

> "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner."

Mr. Justice Blatchford, in speaking of Munn v. Illinois, in the case of **Budd v. New York**, says:

> "There was no attempt to compel the owners of the warehouse to grant the public an interest in their property, but to declare their obligation if they used it in that particular manner."

Mr. Justice Blatchford, in reviewing the decision of the Court of Appeals of New York, says:

> "The Court of Appeals, in its opinion in the Budd case, considered fully the question as to whether the Legislature had power, under the Constitution of the State of New York, to prescribe a maximum charge for elevating grain by stationary ele-

vators, owned by individuals or corporations who had appropriated their property to that use and were engaged in that business."

In **Brass v. North Dakota**, Mr. Justice Shiras, who wrote the majority opinion in the case, says (404):

> "Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouse-man for others.
>
> "We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse."

In Budd v. New York, Mr. Justice Brewer, in a dissenting opinion, defines what Munn v. Illinois held:

> "When, therefore, one devotes his pro-

perty to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

Mr. Justice Miller, in **Wabash, St. Louis and Pacific Railroad v. Illinois, 118 U. S., 557,** explains what was held in Munn v. Illinois:

> "And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his services, could be regulated by Acts of Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In **Dow v. Biedelman, 125 U. S., 680,** Mr. Justice Gray says:

> "In Munn v. Illinois, 94 U. S., 113, after affirming the doctrine that by common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the Legislature 'to declare what shall be a reasonable compensation for such services, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable.' "

In **Weems Steamboat Company v. People's**

Steamboat Company, 214 U. S., 345, Mr. Justice Peckham says (356):

> "If the owner of one of these wharves had devoted it to public use, and permitted the public to use it as it desired, and demanded compensation for such use, the question as to the amount of such compensation might be raised, as in the Munn class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case."

We submit the Munn class of cases are clearly distinguishable, both in fact and principle, from the case at bar. Here the property of the Appellees has not been devoted to public use. There is no attempt to regulate property so devoted, but it is sought to make the appellees become common carriers, and devote their private property to the use of the public.

In **Cargill Co. v. Minnesota, 180 U. S., 452,** this court upheld a Minnesota statute which, in effect, required the Cargill Company to take out a license for carrying on the business in which it had voluntarily engaged, but there was no attempt to change the character of the business nor to compel such concerns as the Cargill Company to store or handle grain for the public.

FOURTH: Do Privately Owned Pipe Lines Tend to Monopoly?

It is contended by the Appellants that the object of the amendment is to prevent monopoly, and

that private pipe lines monopolize, or tend to monopolize, the transportation of oil. If we concede that Congress could prohibit commerce in case of monopoly it has not done so. The argument of the Appellants assumes two false premises:

1st. All interstate pipe lines are monopolies.

2nd. Interstate traffic in oil is forbidden to monopolies.

(1) It is argued by the Appellants that the owners of pipe lines have such an advantage in the transportation of oil that they can, in a measure, control the selling price of crude oil in the fiields which they serve. This is no more true of the oil business than any other which purchases natural products. The owner of a large saw mill, with his products. The owner of a large saw mill, with his with his log trains and loaders; the owner of a large flouring mill, with facilities for buying and handling grain; the owner of a tannery; the owner of a milk purchasing station; or the owner of any industry which purchases raw material has an advantage and can, to a certain degree, control prices in the vicinity because the cost of transportation precludes the shipping of the products to other markets.

To charge the pipe lines with monopoly is as violent an accusation as to say that all the flouring mills of the country comprise a monopoly, or the steel mills. Taken as a whole, they do all the business of that nature, but the diversity of units and multiplicity of lines negatives any idea of monopoly.

There would be monopoly only when all the pipe lines were owned by one company or one person or association. The Tide-Water Pipe Company, Limited, cannot be charged with monopoly. In every field where it operates there is the liveliest competition. In the Allegany, N. Y., field, there are the Wellsville Refining Company, Allegany Pipe Line Company, Columbia Pipe Line Company and the Vacuum Oil Company, all paying different prices. In the Bradford, Pa., field there are the Emery Pipe Line, Penn Lubricating Company, National Transit Company, and others. (508; R. 48). On account of the sharp competition, the Tide-Water Pipe Company, Limited, has been compelled to extend its line to the Illinois fields, where the company has found it more difficult to obtain its requirements of crude oil than in the former fields.

The Tide-Water Oil Company is a very small factor in the purchase of crude oil. The daily production of crude oil in the United States is about 600,000 barrels; east of California about 350,000 barrels. Of this eastern oil, we handle about 1-35th of the total, of 1-60th of the total of the United States.

The Government, however, seeks to link the Tide-Water Pipe Company, Limited, with the Standard Oil Company. The Standard Oil Company, as such, is no longer a monopoly because the combination is broken up by decree of this Court. It cannot be justly contended that this Court, in its

decree segregating the subsidiaries of the Standard Oil Company, promulgated a monopoly, or that, after this segregation, the monopoly still exists.

The monopoly was found to consist in the control, by the Standard Oil Company, of potentially competitive companies, and when the segregation was decreed, the monopoly ceased.

Moreover, the case of the United States v. The Standard Oil Company, so far as it affects the Tide-Water Companies, is res judicata. The Circuit Court held that no combination existed between the Standard Oil Company and the Tide Water interests. See decree of the Circuit Court of the United tates, 173 Fed. Reporter, page 177. In that case, the Tide Water Companies, to-wit: The Tide Water Oil Company and the Tide Water Pipe Company, Limited, were made defendants, and the second section of the decree of the Circuit Court was:

> "The defendants * * * * Tide Water Oil Company, Tide Water Pipe Company, Limited, have not been proved to be engaged in the operation or carrying out of the combination, and the bill is dismissed as to each of them."

To now argue that we are part of a monopoly is to challenge the finding and decree of the Circuit Court and also of this Court (221 U. S., 1), and to supplement and enlarge and even reverse and overrule their judgment and decree.

(2) Can Congress, under the Commerce Clause, prohibit interstate commerce?

It seems that the transportation of lottery tickets by express companies may be prohibited: **Lottery Case, 188 U. S., 321.** In that case the law prohibited all interstate traffic in lottery tickets. In that case Mr. Justice Harlan says (362):

> "We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such objection as that stated, and to be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states."

He also says that the traffic under consideration "is a traffic which no one can be entitled to pursue as of right." It does not follow because traffic in lottery tickets and white slaves may be prohibited, that traffic in wheat, corn, cotton or oil may also be prohibited. Oil is a commodity, the traffic in which one is entitled to pursue as of right. Moreover, traffic in oil has never been declared unlawful by any act of Congress. Congress has not forbidden traffic in oil.

In the White Slave Act, (Hoke v. U. S., 227 U.

S., 308), Congress forbade the interstate transportation of women for immoral purposes. Such transportation was not an inherent right of the individual as the purpose of the transportation prohibited was to do something prohibited by laws of most states, and regarded by society in general as an evil thing.

In **Hippolite Egg Co. v. U. S., 220 U. S. 45,** it has been held that adulterated, debased and misbranded articles of food may be prohibited from interstate commerce.Here again, the thing prohibited is an evil thing in itself and one forbidden by the laws of a large number of the states.

To hold that Congress has prohibited the interstate transportation of oil by private persons is to hold that traffic in oil is a traffic which no one can be entitled to pursue as of right. If this be true, then there is no traffic which one may pursue as of right. In other words, that the commerce clause is the paramount provision o the Constitution and is not limited by anything therein contained. This Court has not so held.

In the **Employer's Liability Cases, 207 U. S., 463, (500),** Mr. Justice White says:

> "It rests upon the conception that the Constitution destroyed the freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of, except upon such conditions as Congress can prescribe, even although the conditions would be otherwise

beyond the power of Congress. It is apparent that if the contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitation of power imposed by the Constitution."

FIFTH: The Appellees are deprived of their property without due process of law.

Even if the object of the amendment is to prevent monopoly, does not the amendment deprive these appellees of their property without due process of law? The Anti-Trust Law provides for a hearing and a judicial determination of the question of the alleged combination. The White Slave Law provides for a hearing and judicial determination in each individual case. So does the Pure Food Law. The private pipe lines, however, are convicted of monopoly by the debates in Congress. They are never given a day in court. Their property is taken without any hearing and such taking is sought to be sustained because certain members of Congress accuse them of being a monopoly. As said by the court below, "the discussions in the Senate and in the report of the Commissioner deal with the conditions of unified ownership or control by the Standard Oil Company of a great portion of the pipe lines of the country, **including the common carrier lines**, and the resulting advantage and power of that company, which were alleged to constitute an unlawful monopoly."

The Appellees in this case have, however, been

judicially determined to be no part of the alleged Standard monopoly. (See 173 Fed. Reporter, 177).

The debates in Congress and the imagined evil sought to be remedied do not justify the taking of a private pipe line for public use without due process of law.

SIXTH: The Amendment deprives the Appellees of their property without just compensation.

Conceding for the purpose of argument what we do not admit as a fact, that privately owned pipe lines may become the instruments of monopoly, the conclusion does not necessarily follow that they may be taken for public use without just compensation.

Prior to the passage of the act the Appellees were engaged in a lawful business. They were violating no laws forbidding monopolies. They were no part of the alleged Standard Oil monopoly. They were protected by the Constitution and if Congress desired to take such pipe lines for public use by converting them into common carriers, it could only do so by compensating the private owners for the property of which they were deprived.

The position of the Government is concisely stated by His Honor, Judge Mack, on page 51 of the dissenting opinion:

> "What, then, is the object of this act? Its aim is neither completely to take from the owner or absolutely to prohibit his use

> of pipe lines theretofore within his exclusive control; it does, however, condition that use in interstate commerce upon his permitting a like use by the general public on payment of reasonable compensation therefor; the alternative is to cease to operate them or to dispose of them."

Under the position taken by the Government, the amendment does not aim to completely deprive the owner of his property; it simply deprives him of its power for his lawful private purposes.

Mr. Justice Miller says, in **Plumpelly v. Canal Company, 80 U. S., 166:**

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert

the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In **Weems Steamboat Company v. People's Co., 214 U. S., 345,** this Court holds:

> "A private wharf on a navigable stream is thus held to be property which can not be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law; and if necessary that it or any part of it be taken for the public use, due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while, at the same time, denying its use by anyone else."

The alternative does not appear in the amendment. If the act does what the Government claims, it takes and converts our property and the property, as well as the individual owners, becomes amenable to every other section of the Commerce Law. We must file our our tariffs; must serve the public, governed by every provision regulating common

carriers. If, however, the act is to be construed in the alternative; if we must cease to operate them or dispose of them, surely the private right is destroyed.

The bare statement of this proposition demonstrates that such construction of the act in question operates to invade and destroy our private rights. The alternative either dedicates and devotes our property to public use, or destroys it altogether by requiring us to cease using and to sell.

The dissenting opinion of the Commerce Court concedes that

> "To deprive one of the entire or partial use of property is a taking thereof."

and asserts

> "A distinction, however, may well be made in the method of compensation, dependent upon whether the owner is deprived of his title, of the possession, or only of the exclusive use."

There is no method of compensation, no provision for compensation in the act. Such omission renders the legislation unconstitutional.

U. S. v. Lynah, 188 U. S., 445.

Gibson v. U. S., 166 U. S., 269;

Scranton v. Wheeler, 179 U. S., 141;

Green Bay and Mississippi Canal Company v. Patten Paper Company, 172 U. S., 58.

The principal business of these appellees is refining of manufacturing the many products of pe-

troleum or crude oil. To facilitate their manufacturing industry, they have provided an economical means to supply raw material.

Petroleum, or crude oil, is a commodity which may be dealt in like other products, and natural gas, coal, and other minerals, or products of the soil, and it is a legitimate subject of commerce.

Congress cannot prohibit the transportation of petroleum for any lawful purpose. The case of **Haskell v. Kansas Natural Gas Company, 221 U. S., 229 and 224 U. S. 217,** sustains this contention.

True it is that the law of the State of Oklahoma was held to interfere with interstate commerce, but the case did not rest on this ground alone. The Court below held that the person who had the absolute property in such commodity had also the right to transport, sell and deliver the same, and that he could not be deprived of this without just compensation.

Mr. Justice Day, explaining in the second case what was held in the first, says (220):

> "This court held that natural gas after severance is a commodity which might be dealt in like other products of the earth, as coal and other minerals, and is a legitimate subject of interstate commerce; * * * * * that it was an unconstitutional interference with the rights of the complainants who were legitimately engaged in that commerce, and that, therefore, the act was null and void."

Mr. Justice Day again says (223):

> "The legislative act in question was an act the main purpose and effect of which were to prohibit the exercise of lawful rights secured by the Federal Constitution."

That the act does take for public use the property of these Appellees is too apparent for argument; that the taking is without just compensation is nearly as obvious. Compensation for the use of the property the courts would secure, but not for the taking. The payment of tolls from time to time for the use of the pipe line does not, and cannot, justly compensate the Appellees for the taking of their property. Such compensation is based, not on the value of the property taken, but merely on the use. It would not compensate the Appellees for the loss which they would suffer in the value of the refinery which the pipe line serves. The capacity of the Appellees' refinery is equal to the entire capacity of their pipe line (Printed Record, page 2, Paragraph VI of Petition). Therefore, the taking of the pipe line involves large injury to them, since, when the pipe line is carrying and delivering oil to others, the refinery of these Appellees must stand idle and without any compensation whatever.

In **Clark v. Nash, 198 U. S., 361**, it is held that peculiar local conditions in Utah, as authorizing condemnation for public use, justify a statute of that state, under which an individual land owner may condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch, in order to enable him to obtain water from a

stream in which he has an interest, to irrigate his land, which otherwise would be worthless. The findings of the court below appear on page 365, and decrees the condemning of right of way through defendant's ditch to the extent of widening it one foot. The decree provides for the payment of damages for the injury sustained by the taking of the easement and improvement of the ditch; and also provides for the payment of a proportionate share of the cost and expense of maintenance. Mr. Justice Peckham, on page 369, said:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develope the natural resources of the state."

In the case at bar there is no recompense for "the harm actually done from time to time" **(Otis Co. v. Ludlow Co., 201 U. S., 140, page 153)**. We may be well paid for pumping oil, but the greatest injury is the idle refinery, the direct result of the devotion of our property to public use.

Referring to the minority opinion in **L. & N. R. Co. v. Central Stock Yards Co., 212 U. S., 132,** the distinction is obvious. We might "charge for the use actually taken," but we have no remedy for the "damage directly resulting."

SEVENTH: The use of Public Highways by the Pipe Lines does not impress a public use upon them.

In the States through which our pipe line passes, the highways are public easements and the public right is confined to the surface, the fee of the land remaining in the owner.

Barclay et al, v. Howells, 6 Peters (U. S.), 489;

Bloomfield & Rochester Natural Gas Company v. Calkins, 62 N. Y., 388;

Woodring v. Forks Township, 28 Pa., 355;

Winters v. Peterson, 24 N. J. Law, 524;

Platt v. Pennsylvania Company, 43 Ohio, 228;

Palatine v. Kreuger, 121 Ill., 72;

Kincaid v. Indianapolis Natural Gas Company, 124 Ind., 577.

The pipe lines of the Appellees are laid on private rights of way acquired from the owners of the land crossed by the public highways. The rights of the Appellees do not depend on any grants from the public authorities, but upon the title of the owner of the land. In no proper sense can the right to use the land occupied by the highway be considered a franchise.

CONCLUSION

In conclusion, we submit that:

1. The Appellees are not a corporation, but a partnership organized under the laws of the State of Pennsylvania. That they are not a corporation is settled by this Court in **Great Southern Fireproof Hotel v. Jones, 177 U. S., 449.**

2. The Appellees have no charter, no fran-

chise, no right of eminent domain, and possess no privileges not possessed by individuals.

3. The Appellees are not common carriers and do not carry oil for the public.

4. The Appellees are engaged solely in producing and buying oil, transporting the same to, and refining it in a refinery in which they are interested as owners.

5. The effect of the Amendment is (1) to create the Appellees common carriers against their will, and (2) to make their private business a public one.

6. Thereby they are deprived of their property without due process of law, and the same is taken for public use without just compensation.

All of which is respectfully submitted.

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For Appellees.

The foregoing brief was largely prepared by Mr. W. I. Lewis in his lifetime, and for that reason his name appears upon it as counsel for the Appellees.

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